No. 12,562

IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation),
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed of the Territorial Insurance Commissioner, Attorney General of Alaska and the Territorial Commissioner of Labor, and PETER LATHOURAKIS,
Appellees.

BRIEF FOR APPELLANT.

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STATEMENT OF PLEADINGS AND FACTS.

A. JURISDICTIONAL STATUTES.

The Workmen's Compensation Act of Alaska (full text, Appendix A) provides:

> "Section 15. PROCEDURE IN DISPUTED CLAIMS. If the employer and the injured employee, or his or her beneficiaries, disagree in regard to the compensation payable under this Act, or, if they have reached such an agreement, which has been signed by him, her or them and has been filed with and approved by the Industrial Board as provided in Section 6, and afterwards disagree

as to the continuance of payments under such approved agreement, or as to the period for which payments shall be made, or as to the amount to be paid, or if a dispute arises for any other reason, either party may then make application to the Industrial Board for the determination of the matters in dispute.

Upon the filing of such application, the Board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the Board, of the time and place of such hearing. Such hearings shall be held in the district in which such injury occurred, unless, for the convenience of witnesses or other good cause, the Board determines that such hearing should be held elsewhere.

All disputes arising under this Act, if not settled by agreement as in this Act provided, shall be determined by the Board; and nothing in this Section contained shall be construed to affect the continuing jurisdiction of the Board as provided in Section 4 nor to prevent such Board from making any investigation on its own motion.

The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of the proceedings, and a copy thereof shall immediately be sent to each of the parties."

Section 43-3-15, ACLA 1949, Volume 2.

The act further provides:

"Section 16. Review By Full Board. If an application for review is made to the Industrial

Board within ten days from the date of an award, made by less than all the members, the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith."

Section 43-3-16, ACLA 1949, Volume 2.

The act further provides:

"Section 22. COURT REVIEW; QUESTION OF LAW. An award of the Board, by less than all of the members, as provided in Section 15, if not reviewed as provided in Section 16, shall be final and conclusive.

An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if the award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the District in which the injury occurred. The orders, writs and processes of the courts in such proceeding may run, be served, and be returnable in accordance with the rules of said court, but the return day and hearing thereon shall not be later than sixty days after the institution of such proceedings. The payment of the amounts required by such award shall not be stayed pending final decision in any such pro-

ceeding unless, upon application for an interlocutory injunction, the court on hearing, after not less than ten days' notice to the parties and the Industrial Board, allows the stay of such payments, in whole or in part, where substantial damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such substantial damage would result to the employer, and specifying the nature of the damage. * * *''

Section 43-3-22, ACLA 1949, Volume 2.

The act further provides:

"Section 25. JURISDICTION OF COURT. No court of this Territory, except the United States District Court on review, or the United States Circuit Court of Appeals on appeal, shall have jurisdiction to review, vacate, set aside, reverse, correct, amend or annul any order or award of the Industrial Board or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Industrial Board in the performance of its duties."

Section 43-3-25, ACLA 1949, Volume 2.

Section 1291 of the new Federal Judicial Code provides:

"Section 1291. Final Decisions of District Courts. The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United

States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

Title 28, USCA Judiciary and Judicial Procedure, Section 1291.

B. PLEADINGS.

"Application for Adjustment of Claim" filed with Board by appellee Lathourakis, dated April 13, 1949. R. 8-10.

"Admission of Service and Answer to Application" filed with Board by appellant, dated May 26, 1949 (R. 11-12), in which appellant gave notice that "The defendant will insist that all evidence must be adduced according to legal rules for the admission of evidence and that it is otherwise inadmissible, and will object to all ex parte evidence offered to prove or seek to prove any of the facts upon which the claimant bases his claim and the defendant will insist upon having a hearing before the full membership of the Board." R. 12.

Appellant also served and filed its written objections further giving notice among other things as follows:

"4. That it contends that evidence must be adduced in a legal manner, and not ex parte, and is entitled to the right of cross-examination of all of claimant's witnesses." R. 20.

"5. That it demands a hearing before the full board with all members of the board present." R. 20.

"6. That the law does not authorize or permit a hearing to be held upon the extent of alleged temporary disability and a later hearing upon partial permanent disability." R. 20-21.

"7. That claimant, has, if any, only one claim." R. 21.

"8. The Board has no power or authority to award both temporary disability and permanent partial or total disability and, if any permanent partial or total disability is awarded, then no temporary disability can be awarded." R. 21.

Appellee Lathourakis gave his testimony by deposition (R. 21-33) before the full board on May 26, 1949. See Appendix B for proof of date.

Subsequently a hearing was held before the full board on August 30, 1949. For proof of date see Appendix B.

At the hearing Fred Sheils testified on behalf of appellee Lathourakis, which testimony was taken in the form of a deposition. R. 33-36.

In addition to the testimony of Lathourakis and Sheils, the board, over appellant's objections (R. 12, 20-21), considered and treated as evidence the unverified letters of Dr. L. E. Williams of May 20, 1949 (R. 37-38), and of March 23, 1949 (R. 116-118), and of Dr. Slyfield of February 23, 1949 (R. 112-115).

At the hearing the appellant offered the testimony by deposition of Dr. Thorburn S. McGowan (R. 40-81) and of Dr. A. Bernard Gray (R. 84-109), and also the stipulation between the parties that appellee Lathourakis worked as a gill net fisherman during the 1949 Bristol Bay salmon fishing season and was paid $1,528.67, he and his fishing partner having caught 8400 fish. R. 111.

The full board on September 28, 1949, made its decision and award (R. 13-18), in which it found that appellee Lathourakis' temporary total disability continued from July 19, 1948, to May 20, 1949 (R. 16), and that he also sustained 50% of total permanent disability related to loss of earning capacity (R. 17), and that he was entitled to temporary total disability of $3,833.55 for 315 days, less $1,050.80 already paid him by appellant, plus interest at 8% per annum from date due until paid, plus permanent partial disability compensation of $3,600.00 on the basis of 50% of total permanent disability for a married man. R. 17.

The Board also allowed appellee Lathourakis an attorney fee of $1,100.00 (R. 18), but subsequently, at the hearing before the District Court, appellee Lathourakis tacitly admitted the error of this finding.

This $1,100.00 fee has no relationship to the $350.00 attorney fee which the District Court allowed to appellee Lathourakis for services of his attorney in the proceedings before the District Court. Point 7, R. 132.

Appellant appealed from the Board's decision to the District Court of the Third Judicial Division of

Alaska, within which Division the injury occurred, which Third Judicial Division transferred it to the First Judicial Division for trial. Complaint and Appeal, R. 3-8.

Appellant and the appellee Board stipulated that appellee Lathourakis might be made a party defendant in the cause before the District Court. R. 19.

Appellee Lathourakis filed his Answer (R. 19) in which he denied all of the allegations of Paragraph IX (R. 6-7) of appellant's "Complaint and Appeal", except subparagraph 4 thereof wherein appellant alleged that the Board had no power and authority to allow the aforesaid attorney fee of $1,100.00, whereby he admitted appellant's contention in regard thereto.

Appellee Lathourakis made no denial of any of the allegations of the remaining Paragraphs of appellant's Complaint and Appeal; hence they as well as subparagraph 4 of Paragraph IX stood admitted at the hearing before the District Court, which treated appellee Lathourakis' Answer as a Demurrer to appellant's Complaint and Appeal.

The Alaska Industrial Board did not move or otherwise plead to appellant's Complaint and Appeal.

After a hearing (R. 112) before the District Court it rendered its written opinion (R. 119-123) on February 9, 1950, in which it held that appellee Lathourakis sustained total temporary disability for 307 days and also 50% permanent disability. R. 123.

The District Court entered its Judgment on March 24, 1950, allowing appellee Lathourakis total temporary disability compensation of $2,005.00, which is in addition to the $1,050.80 already paid by appellant to Lathourakis, and also the further sum of $3,600.00 as 50% permanent disability compensation, together with interest thereon at 8% per annum from September 28, 1949, and also an attorney's fee of $350.00. R. 125.

Thus actually the Judgment is that Lathourakis was allowed total temporary disability compensation of $3,055.80 ($2,005.00 plus $1,050.80), not $3,833.55 as allowed by the Board (R. 17), plus 50% permanent disability compensation of $3,600.00, or a total compensation of $6,655.80. R. 125.

On March 28, 1950, appellant filed its Notice of Appeal to this Court. R. 126.

It made and filed its Supersedeas on Appeal which was approved as to form, amount and sufficiency of surety by appellee Lathourakis and was approved and the appeal allowed on April 3, 1950, by the Judge of the District Court. R. 126-129.

Appellant served and filed its Statement of Points on April 18, 1950. (R. 130-132).

Appellant served and filed its Designation of Contents of Record on Appeal on April 18, 1950. (R. 133-135).

Appellee Lathourakis by designation included in the record the unverified ex parte letters of Dr. Slyfield of February 23, 1949, and of Dr. Williams of March 23, 1949. (R. 136).

C. FACTS.

Appellee Lathourakis, while in appellant's employ as a commercial fisherman during the salmon fishing season of 1948, at Bristol Bay, Alaska, in the Third Judicial Division of the District Court of the Territory of Alaska, on July 16, 1948, was injured by a collision between the fishing boat, which he then occupied and which was then being towed by a power boat, and the fish scow or barge to which the fish from the fishing boat were being taken for delivery. (R. 22; also R. 9).

Appellant at that time was engaged in the operation of a salmon cannery at Libbyville, Alaska, and had in its employ three or more employees, and admitted the relationship of employer and employee between it and Lathourakis. (R. 3-4).

Appellee Lathourakis' evidence consisted of testimony of himself (R. 21-33) and of his witness Fred Sheils (R. 33-36) and of Dr. Williams' unverified, ex parte letter to Attorney Jackson of May 20, 1949 (R. 37-38), and of March 23, 1949 (R. 116-118), and of Dr. Slyfield's unverified, ex parte letter to attorney Jackson of February 23, 1949 (R. 112-115).

Appellant's evidence consisted of the testimony of Dr. Thorburn S. McGowan (R. 40-81) and of Dr. A. Bernard Gray (R. 84-109).

The Board's decision and award was rendered on September 28, 1949 (R. 18), but notice thereof was not given to appellant until October 1, 1949 (R. 6), which filed its "Complaint and Appeal" with the

Clerk of the District Court of the Third Judicial Division on October 27, 1949 (R. 18), which Court transferred it to the First Judicial Division where it was filed November 2, 1949 (R. 2).

The District Court of the First Judicial Division entered final Judgment (R. 124-125) on March 24, 1950, for temporary total disability compensation of $2,005.00, which is additional to the $1,050.80 paid by appellant to Lathourakis prior to his filing his claim (R. 10), and for 50% permanent disability compensation of $3,600.00.

QUESTIONS PRESENTED.

Appellant's "Statement of Points" (R. 130-132) makes seven points, upon which appellant relies, but which appellant believes present three questions.

None of these questions so far as appellant is informed has ever before been presented either to this or to the lower Court.

The first two of these questions were presented at the hearing before the Board by appellant's "Admission of Service and Answer to Application" (R. 11-12), and by its written Objections filed with the Board (R. 20-21) and in the District Court by appellant's "Complaint and Appeal", particularly by Paragraph IX thereof (R. 6-7) which Paragraph IX, except subparagraph 4, were put in issue by appellee Lathourakis' Answer. R. 19.

First—Appellant contends that the Workmen's Compensation Act of Alaska (Full text—Appendix A) does not authorize the Board to base its Findings, Decision and Award upon ex parte, hearsay, unverified, or other incompetent evidence.

This rule is supported by many decisions, hereinafter cited, and, inasmuch as the Board's Findings, Decision and Award were based solely upon ex parte, hearsay, unverified, or other incompetent evidence, those Findings were not conclusive upon the District Court; hence, it should have based its Judgment upon the only competent evidence that was adduced at the hearing before the Board and modified the Board's Findings to adjudge that appellee Lathourakis' temporary total disability ended October 1, 1948, and that he sustained no permanent disability as a result of the accidental injury upon which he based his claim.

Second—Appellant contends that the Workmen's Compensation Act of Alaska does not empower the Board to award to an injured employee for one and the same injury not only temporary total disability compensation but also permanent, either partial or total, disability compensation; hence, that the Board's Finding that appellee Lathourakis sustained both temporary total disability until May 20, 1949, and also 50% permanent disability and is entitled to not only temporary total disability compensation but also 50% permanent disability compensation, was not conclusive upon the District Court and should have been modified by the District Court, under the competent evidence adduced at the hearing before the Board, to

temporary total disability with compensation therefor until October 1, 1948.

Appellant concedes the absence of extensive judicial authority upon this point; but, submits that an analysis of the Workmen's Compensation Act of Alaska (Full text—Appendix A) shows that it does not authorize both total temporary disability compensation and permanent, either partial or total, disability compensation, to an injured employee for one and the same injury.

Third—Appellant contends that the District Court for the Territory of Alaska has no jurisdiction to allow, in a review before it on appeal of the Alaska Industrial Board's finding, decision and award, an attorney fee to the successful litigant in that appeal; hence, that the District Court erred in its Judgment (R. 125) in adjudging that appellant should pay appellee Lathourakis an attorney fee of $350.00.

Appellant submits the Workmen's Compensation Act of Alaska (Full text—Appendix A) is a special procedural Act and that the only compensation payable to an injured employee is that specified by that Act; hence, that allowance of costs with "a reasonable attorney's fee to be fixed by the Court", under Section 55-11-55, ACLA 1949, Volume 3, is inapplicable; and that the payment of an attorney's fee of $350.00 would constitute additional compensation which is not authorized by the Act.

This $350.00 is not to be confused with the $1,100.00 attorney fee included in the Board's award (R. 18),

the erroneous allowance whereof was conceded by appellee Lathourakis by not denying in his Answer (R. 19) subsection 4 of Paragraph IX of appellant's "Complaint and Appeal" (R. 7).

This question was raised by oral exception to the Judgment and by serving and filing appellant's Statement of Points. (Point 7, R. 132).

ARGUMENT.

(A) AWARD MUST BE BASED UPON COMPETENT EVIDENCE.

Question 1 (Points 1-5, R. 130-131).

As early as May 26, 1949, both the Board and the appellee Lathourakis were informed by appellant by demand therefor made by the latter in its Answer (R. 12) that appellant would insist that all evidence be adduced according to legal rules for the admission of evidence or that it would otherwise be inadmissible and would object to all ex parte evidence offered to prove or seeking to prove any of the facts upon which the appellee Lathourakis based his claim.

Appellant also served and filed on June 27, 1949, its written Objections to the same effect. (R. 20-21).

The Board's Findings that appellee Lathourakis had been totally temporarily disabled from July 19, 1948, to May 20, 1949, (R. 16) and entitled to 315 days total temporary disability compensation (Award, R. 17), reduced by Judgment to 307 days and from $3,833.55 to $3,055.80 ($2,005.00 plus $1,050.80) (R. 125) and had suffered 50% permanent disability and

was entitled to permanent partial disability compensation of $3,600.00 (R. 17), affirmed by Judgment (R. 125), are not based upon any legal or competent evidence.

To the contrary they were both based upon either ex parte or hearsay evidence.

Appellee Lathourakis' only evidence was his personal testimony (R. 21-33), the personal testimony of layman Fred Sheils (R. 33-36) and the unverified, ex parte letters to Lathourakis' attorney of Dr. Williams of May 20, 1949 (R. 37-38) and of March 23, 1949 (R. 116-118), and of Dr. Slyfield of February 23, 1949 (R. 112-115).

Without conceding the credibility of or any probative weight to the testimony of either Sheils or Lathourakis, we assume, for the purposes of the argument, that a person claiming an injury, even though a layman, may properly testify that he is still partially or totally disabled from performing his work; also that a lay witness may properly testify from personal knowledge to the manner in which a person, who claims to have been injured, does his work after the receipt of the claimed injury.

But, both Lathourakis and Sheils were laymen, and while doubtless they could properly testify, for instance, that they saw that Lathourakis' right forearm was swollen or black and blue on a particular day or days, or to any other objective injury, and Lathourakis himself could testify that he suffered pain, weakness, or physical impairment, and a lay witness, who witnessed it, could testify that Lathourakis by

his conduct or expression evinced pain or suffering, yet, being laymen, the testimony of neither is admissible to prove subjective injuries, such as are claimed here, the character, extent and future effect of which can be only known to experts in human anatomy, or that Lathourakis' physical condition at the time he testified was caused by his claimed injury; hence, no inference can be properly based upon such if any testimony as they did give, that any subjective symptoms of which Lathourakis claimed to be suffering at the time of giving his testimony, were due to his accident.

Lathourakis in his "Application for Adjustment of Claim", claims, in Question 1, "crushing injury to right arm, and severe injury to chest, esophagus and abdomen," and in Question 9 "injury to arm, chest, and esophagus." (R. 9-10.)

Nowhere does he claim any objective injury, nor is there any evidence of any objective injury such as a black eye, a broken arm, a mashed finger, other than the temporary discoloration, swelling, and bruising of his right forearm.

He signed his Application on April 13, 1949, (R. 10) subsequent to the writing of the letters of Dr. Slyfield of February 23, 1949, (R. 112-115) and of Dr. Williams of March 23, 1949, (R. 116-118), of which letters undoubtedly Lathourakis had knowledge inasmuch as they were written to his attorney, when he so signed his "Application for Adjustment of Claim."

His claim is actually premised (R. 25) upon his having suffered subjective or internal injuries, none

of which disclosed their presence upon the surface of his body where they would be the object of a witness' eyes.

Only an expert in human anatomy is qualified to testify as to the character, extent and future effect, if any, of the internal injuries he claims to have suffered.

> "Where, however, the injuries or pain are subjective and of such a character that laymen cannot know with reasonable certainty the cause, extent, or their future effect, then there must be offered evidence by expert witnesses, learned in human anatomy, who can testify from a personal examination or from knowledge of the history of the case or from a hypothetical question based on the facts as to the matter involved in the suit."
>
> *Schwartz Trial of Automobile Cases,* Second Edition, Pages 429, 430;
>
> *Sickmund v. Conn. Co.* (Conn.) 189 Atl. 876;
>
> *Shawnee-Tecumseh Traction Co. v. Grigg,* (Okla.) 151 P. 230.

If this were not the rule there would be no sense in calling a medical expert or qualifying him as such for his testimony.

The distinction is perhaps no better shown than that a layman can testify as to another's evincing pain, but he is not qualified to testify whether that expression of pain is feigned or real. A medical expert must be called to testify to that. The layman can only testify to the facts as he observes them.

Pierson v. Ill. C. R. Co., 123 N.W. (Mich.) 576.

Neither Lathourakis nor Sheils was qualified to state whether the condition in which Lathourakis claimed he was in on May 26, 1949, (the date on which he testified before the Alaska Industrial Board, See Appendix B), or his working ability in the summer of 1949 to which Sheils testified, was the result of the injury Lathourakis claims to have received on July 16, 1948.

The point is that a layman has no such knowledge of human anatomy as to be able to do anything but guess as to the cause of a subjective symptom.

Thus, remote and unusual effects of physical injuries such as cancer or tuberculosis would call for more than a layman's knowledge of cause and effect.

Hickenbottom v. D. L. & W. R. R. Co., 25 NE (NY) 279;

Schwartz Trial of Automobile Cases, Second Edition, page 453.

Having in nowise qualified himself as an expert in human anatomy, Lathourakis' testimony, either direct or implied, that his present condition is the effect of his injury is nothing more than surmise, and his opinion is incompetent.

> "A person injured may testify to the effects of an injury or operation upon him, and what is the resulting condition, provided that, unless he is an expert his answer states only facts of knowledge and consciousness, and not opinions, requiring professional skill to form justly."
>
> *Abbott on Facts* (Vesselman's 5th Ed.) P. 1227, Sec. 857.

Abbott on Facts cites the following cases in support of his thesis, i.e.:

> One, not an expert, cannot testify that the effect of a blow on his ear was to produce deafness.
> *Stevens v. Rodger,* 25 Hun. (N.Y.) 54, and
>
> One, not an expert, cannot testify that his head will never be the same as it was.
> *Pfau v. Alteria,* 52 N.Y.S. 88.

Abbott on Facts further states:

> "The opinions of medical experts as to the causes of death, injury, or other particular physical condition are admissible as evidence upon the ground that such witnesses have *peculiar knowledge or skill* with reference to the particular subject matter in question. Such opinions are therefore admissible where they are *inferences of skill* derived either from observation or from *scientific deductions* from given facts. So, *an expert* who has examined an injured person or the body of one deceased may state *his opinion* as to what was the cause of the wound or other injury thereon or the cause of death." (Emphasis supplied).
>
> *Abbott on Facts* (Vesselman's 5th Ed.) P. 375, Section 256 (d).

The testimony of Lathourakis and his witness Sheils was thus incompetent because of their incompetency to testify as to the extent, duration and cause of his physical condition, thus reducing Lathourakis' evidence to the two unverified, ex parte letters of Dr. Williams of March 23, 1949, (R. 116-118) and of

May 20, 1949, (R. 37-38), and of Dr. Slyfield of February 23, 1949. (R. 112-115).

Patently the statements in the first three paragraphs (R. 113) of Dr. Slyfield's letter of February 23, 1949, were hearsay. He is repeating nothing more than what appellee Lathourakis told him.

This examination by Dr. Slyfield was made on February 17, 1949. (R. 112).

From such physical examination as Dr. Slyfield then made of appellee Lathourakis he concluded that Lathourakis "looks fairly well and does not appear to be in any distress". (R. 114).

He also stated that Lathourakis' complaints of pain in the left thorax and shortness of breath on walking were presumably the result of the necessary surgery (R. 114) and that the fluoroscope showed there was still some constriction in the upper esophagus and a widening in the lower part (R. 114) and intimated that he approved the finding by somebody, not mentioned, of markedly thickened esophageal wall. (R. 115).

The last paragraph of Dr. Slyfield's letter (R. 115) also is clearly hearsay, seemingly founded upon what appellee Lathourakis told Dr. Slyfield, and his conjectured opinion is based upon that hearsay.

Dr. Slyfield's letter nowhere indicates nor do the records disclose any evidence, that his examination of appellee Lathourakis was made in the capacity of a physician being consulted by a patient for the pur-

pose of securing medical aid to alleviate his condition, but that examination was nothing more than an effort to obtain medical testimony, based upon appellee Lathourakis' statements to the physician, to bolster up appellee Lathourakis' claim as to the extent and duration of his injury. (R. 112).

Dr. Williams' letter of March 23, 1949, specifically admits that his examination of appellee Lathourakis on March 22, 1949, was not that of a physician seeking to prescribe for his patient but solely to determine on that date what disability appellee Lathourakis had suffered from his accident of July 16, 1948. (R. 116).

Except for such actual physical knowledge as Dr. Williams had gained by personally examining appellee Lathourakis, the statements in his letter also are based entirely upon hearsay, apparently upon oral statements made to him on March 22, 1949, by Lathourakis. (R. 116-118).

Dr. Williams did not hesitate to state that the "examination shows that he has lost about 45 pounds since the operation and has regained about 20 pounds in the past two months." (R. 117). Dr. Williams, however, failed to explain how an examination made on March 22, 1949, could possibly show that appellee Lathourakis had lost 45 pounds since October 11, 1948, but had regained 20 pounds since January 23, 1949.

Dr. Williams further stated that appellee Lathourakis had suffered permanent disability of 65% resulting from a chest injury sustained on July 16, 1948, and the subsequent necessary surgical work, and also

20% of the amputation value of the major upper extremity of the major forearm at the elbow. (R. 117-118).

He further said that in making those ratings he had taken into consideration that the appellee Lathourakis would regain some strength of grip in the forearm with increased use and some improvement of the present state of general weakness would ensue. (R. 117-118).

He further said "otherwise, I feel that his condition is fixed at this time." (R. 118).

Although the record does not disclose that Dr. Williams had anything before him except appellee Lathourakis' oral statement and an X-Ray from some undisclosed source, he concluded by stating that "The man has been totally disabled from work since the date of injury and is still disabled for any but the slightest work." (R. 118).

Dr. Williams' later letter of May 20, 1949, (R. 37-38), also shows that that examination was not made because of a patient consulting a physician for medical relief but for purposes of bolstering up appellee Lathourakis' claim for compensation.

The statements in this letter are also based upon hearsay statements made to Dr. Williams by appellee Lathourakis. (R. 37). Dr. Williams did not in this letter attempt to compare the condition of appellee Lathourakis as disclosed on May 20, 1949, by that examination, with that disclosed by the examination on March 22, 1949, (R. 116-118) even in such a matter

as weight. Dr. Williams gives no basis of comparison as to the gain or loss in weight by Lathourakis during the intervening two month period.

He again rates Lathourakis as having suffered 65% unspecified permanent disability for his chest and upper abdominal condition and general physical weakness, but increases the rating as to the forearm up to 25% (R. 37-38); but confesses that "It would be more satisfactory to rate this man's disability after he has attempted fishing. At this time it hardly appears that he will be able to develop the strength and endurance and eat enough food to enable him to do the work." (R. 37).

Seemingly on May 20, 1949, appellee Lathourakis planned and so told Dr. Williams of his intention to re-engage in the occupation of fishing during the ensuing salmon fishing season, in which occupation he did engage (Stipulation, R. 111) and was actually the sixth or seventh high boat out of twenty-one boats fishing for his employer that season. (Sheils' Deposition, R. 36).

Repetition of statements made by Lathourakis to Drs. Williams and Slyfield, because they were Doctors are no more admissible than though they were laymen, and are inadmissible under the hearsay rule that such statements are not admissible unless brought within some exception, such as being part of the *res gestae,* of the hearsay rule. These particular statements disclose that they do not come within any exception to that rule.

Lathourakis' statements to those Doctors on the occasions reported upon by them in their letters were not involuntary exclamations of pain by Lathourakis. Neither were they declarations made to those physicians so that the latter could prescribe curative remedies to him.

His statements made to them and used by them in writing those letters we submit is within the rule, namely:

> "A clear distinction is drawn, however, between involuntary exclamations of pain and evidence of simple declarations by the plaintiff made some time after the injury that he was then suffering pain. Such evidence is of a totally different nature, the likelihood of gross exaggeration being so much greater. Evidence of complaints of pain is therefore inadmissible unless made to a physician for the purpose of receiving treatment."
>
> *Schwartz Trial of Automobile Accident Cases,* (2d Edition), page 438,

citing:

> *Roche v. Brooklyn C. & N. R. Co.,* 105 N.Y. 294;
>
> *West Chicago S. R. Co. v. Kennelly,* 48 N.E. 996;
>
> *Cashin v. N. Y., N. H. & H. R. Co.,* 70 N.E. 930;
>
> *Sund v. Chicago R. I. & P. Co.,* 204 N.W. 628;
>
> *Davidson v. Cornell,* 132 N.Y. 132, 228, 237.

This rule is also expressed:

> "Declarations made by one injured to his attending physician are admissible when they relate

to the part of his body injured, his suffering symptoms and the like; but, *not if they relate to the cause of the injury.* This rule is more rigorously applied to lay witnesses. Chicago & A. R. Co. v. Industrial Board, 113 N.E. 629." (Emphasis supplied).

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. 606, 6 A.L.R. 543.

Also:

Shaughnessy v. Holt, 86 N.E. (Ill.) 256, annotated in 21 L.R.A. (N.S.) 826.

However, Dr. Williams' letter of May 20, 1949, (R. 37-38), is the only basis of the Board's finding that Lathourakis' total temporary disability continued until May 20, 1949. (Award, R. 16).

That letter contains not a single statement or even intimation pertaining to total temporary disability, or that on May 20, 1949, Williams found that Lathourakis' previous temporary disability had become fixed at 50 per cent unspecified permanent partial disabilities. (Williams' letter, R. 38). The words "at present" do not admit or deny that those unspecified permanent partial disabilities may have become fixed days, weeks, or months previous to May 20, 1949, and his total temporary disability ended those same days, weeks, or months prior to May 20, 1949; in fact, on March 23, 1949, Dr. Williams thought Lathourakis' condition, except for some further improvement, had then become fixed. (R. 118).

The sentences, "It would be more satisfactory to rate this man's disability after he has attempted fishing. At this time it hardly appears that he will be able to develop the strength and endurance and eat enough food to enable him to do the work," (R. 37) indicate that Dr. Williams himself did not know whether Lauthourakis' temporary disability had ended or any partial permanent disability had become fixed or apparent. They do indicate, however, that on May 20, 1949, Lathourakis told Dr. Williams that he intended to go fishing during the ensuing fishing season although six days later in giving his testimony before the Board he intimated that he would be unable to fish during that season. (R. 27; also R. 29).

Nor was there any competent evidence before the Board, as we shall show infra, that Lathourakis' total temporary disability ended on any date other than on October 1, 1948.

The general rule is,

> "Where medical proof is required, it must be furnished either by producing the doctor for examination and cross examination or by his deposition taken pursuant to law. The Doctor's unverified report or declarations not made in Court, will be insufficient."
>
> *Schwartz Trial of Automobile Cases,* Second Edition, page 430,

citing:

> *Lindquist v. Triedelson,* 248 N.Y. Suppl. 775;
> *Francisco v. Circle, etc. Co.* (Ore.) 265 P. 801;
> *Godkin v. Brooklyn, etc. Corp.* 269 N.Y. Suppl. 809.

This rule is not obviated because this hearing is under the Alaska Workmen's Compensation Act which provides:

> ". . . . Process and procedure under this Act shall be as summary and simple as reasonably may be . . . ."
>
> Section 43-3-14, ACLA 1949, Volume 2.

> ". . . The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner . . ."
>
> Section 43-3-15, ACLA 1949, Volume 2.

The Act nowhere sanctions the use of incompetent or hearsay evidence upon which to base the Board's findings.

To the contrary, the Act empowers the Board to administer oaths.

> ". . . The Board or any member thereof shall have the power for the purpose of this Act to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute . . .
>
> "The District Court, on application of the Industrial Board or any member thereof, shall enforce, by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records."
>
> Section 43-3-14, ACLA 1949, Volume 2.

What sense or consistency could there be to administer an oath to either an employer or an employee if

he personally appeared to testify before the Board, and on the other hand to consider as evidence an unverified, ex parte letter written by either an employer, an employee, or even a physician, which he mailed or handed to the Board?

The use of such unverified, ex parte letters by either employer or employee can only lead to fraud, deceit and lies, without opportunity to the other to expose such fraud, deceit and lies by cross-examination.

The Act also provides:

> "When an application for review is made, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable . . ."
>
> Section 43-3-16, ACLA 1949, Volume 2.

These and other provisions of the Act plainly indicate its intent that the hearing shall not be a Star Chamber proceedings, but shall be held, though summarily, in an orderly, legal, quasi-judicial manner.

The language of the Act, namely:

> "Process and procedure under this Act shall be as summary and simple as reasonably may be."
>
> Section 43-3-14, ACLA 1949, Volume 2.

is not peculiar to Alaska. It is found in workmen's compensation statutes of various other jurisdictions. That language has been stated by an authoritative work on Workmen's Compensation Laws to bar hearsay.

"Other state legislatures did not abolish all common rules" (for workmen's compensation hearings). "They provided that 'Process and procedure should be as simple and summary as reasonably may be.' Procedure was simplified. Simple forms were used. The mail replaced the sheriff. Hearsay was taboo and should not even be admitted in evidence."

Horovitz Injury and Death under Workmen's Compensation Laws (1944), Page 242.

Even in jurisdictions where the administrative tribunal of such statutes may dispense with the technical rules of evidence, an evidentiary rule of substance is often retained.

"It is manifest, however, that the rule against hearsay is not technical but vitally substantial and may not properly be disregarded under such statutory provisions without grave danger of collusion, imposition, and injustice. If a claimant be permitted to make out a case upon the essential facts of accidental injury upon hearsay testimony alone, there is no limit to the frauds and wrongs that may be encouraged and made possible."

Lallier Construction Co. v. Industrial Commission, 17P2 (Col.) 534.

American Jurisprudence says:

"It may be stated as a general rule that, in the absence of any statutory sanction therefor, hearsay evidence is not admissible in a proceeding before a compensation board or commission, unless it falls within one of the established exceptions to the rule of exclusion."

58 *Am. Jur.* 863, Sec. 445.

citing an Illinois decision which held not only that hearsay was inadmissible but also that evidence was inadmissible where the adverse party had been denied the right of *cross-examination,* viz.:

> "The sole question raised in this case is whether or not there is any competent evidence in the record showing that the death of Cloyes was caused by an injury which arose out of and in the course of his employment. The oral testimony bearing upon that question, heard before the arbitrator, and the Industrial Commission over the plaintiff in error's objection, was hearsay and incompetent. That testimony consisted of statements of the witnesses of what the deceased told them about when, where, and how he received the injury, and what he was doing at that time. No one testified who had any knowledge of those facts, except from the statements made to them by the deceased. Declarations made by one injured to his attending physician are admissible when they relate to the part of his body injured, his suffering, symptoms, and the like, but not if they relate to the cause of the injury. This rule is more rigorously enforced when applied to lay witnesses. Chicago & A. R. Co. v. Industrial Board, 274 Ill. 336, 113 NE 629.
>
> * * * * * * *
>
> "It is a well-known and well-recognized rule that the evidence of a witness or witnesses, dead or alive, in any suit, although prosecuted to final judgment, is not admissible against any third party in another suit who was not a party to such judgment. The main ground upon which this rule is based is that such third party had no right of cross-examination of such witness or witnesses.

The evidence of witnesses before the coroner's jury, dead or living, is not admisible against either party in a civil suit for damages, and for the same reasons above given. Pittsburgh, C & St. L. R. Co. v. McGrath, 115 Ill. 172, 3 N.E. 439; Knights Templars' & M. Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N.E. 1066. If the evidence of the witnesses before the coroner's jury is not receivable against a party in the civil suit growing out of the death of the party over whose body the inquest is held, and the judgment and findings of a court in another suit concerning the same death are not admissible, there is no sound reason, in our judgment, why the inquest of a coroner ought to be admissible to prove, prime facie or otherwise, any issue in such case."

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. (Ill.) 606, 6 ALR at Pages 543, 546, 547.

also citing:

Reck v. Whittlesberger, 148 N.W. (Mich.) 247.

The California Court has also held:

"An award based merely on hearsay evidence cannot be sustained."

Employers, etc. v. Industrial A. C., 151 P. 423.

The Annotation on Workmen's Compensation LRA 1916(A), Page 267, states:

"Nor, according to the weight of authority, can it" (the Board) "base an award on hearsay evidence only,"

citing the foregoing cases of:

Reck v. Whittlesberger, 148 N.W. 247;

Employers, etc. v. Industrial A. C., 151 P. 423.

The language of the New York Act providing that the Commission shall not be bound by common-law or statutory rules of evidence, or by technical rules of procedure and may make its investigation in such a way as to ascertain the substantial rights of the parties—which language is much broader than that of the Alaskan Act—has been held not to mean that the Commission may base an award upon hearsay evidence alone. While the New York Act allows the admission of hearsay evidence, there must be legal evidence in support of an award.

> *Carroll v. Knickerbocker Ice Co.,* 113 N.E. 507, which reversed the previous decision in that case in 155 N. Y. Supp. 1, L.R.A. 1916A, at Page 268, note 9.

It will be noted that the Board's Award herein has no legal evidence whatever to support its Findings.

The Maryland statute, similar to that of New York, was construed similarly to the New York Act.

> "The first three exceptions were against the admission of the testimony of Mrs. Traylor and Mrs. Carey as to Traylor's statements when he was sick on his return from work, on occasions prior to the last that he had been gassed at the plant. In Standard Oil Co. v. Mealey, 147 Md. 252, 127 Atl. 851, it is said in the opinion delivered by Chief Judge Bond: 'Divergent views have been entertained in other jurisdictions on the relaxation by a Court of its ordinary rule for excluding hearsay evidence on review of compensation cases. . . . In New York, where the statutory provisions for the relaxation of rules of evidence before the Commission is the same as

that in the Maryland Act, hearsay testimony is received in court reviews, but an award is not permitted to be based on such testimony alone. Carroll v. Knickerbocker Ice Co. 218 N.Y. 435, 113 N.E. 507, Ann. Cas. 1918B, 540; Belcher v. Carthage Mach. Co. 224 N.Y. 326, 120 N.E. 735; State Treasurer v. West Side Trucking Co., 233 N.Y. 203, 135 N.Y. 244; Hansen v. Turner Constr. 224 N.Y. 331, 120 N.E. 693. And to the same effect are Kelley's case, 123 Me. 261, 122 Atl. 580; Royal v. Hawkeye Portland Cement Co., 195 Iowa, 534, 192 N.W. 406; Reck v. Whittlesberger, 181 Mich. 463, 148 N.W. 247, Ann. Cas. 1916C, 771, 5 N.C.C.A. 917; Garfield Smelting Co. v. Industrial Commission, 53 Utah 133, 178 Pac. 57; Rockefeller v. Industrial Commission, 58 Utah 124, 197 Pac. 1038; Valentine v. Weaver, 191 Ky. 37, 228 S.W. 1036; Riley v. Carnegie Steel Co., 276 Pa. 82, 119 Atl. 832.' * * * *''

Bethlehem Steel Co. v. Traylor, 148 Atl. 246, 73 ALR 479, 483.

The Michigan Court held, to make the facts found by the Board conclusive, they must be based upon competent legal evidence, and not on bare supposition, guess, or conjecture, nor on rumor or incompetent evidence.

Reck v. Whittlesberger, 148 N.W. 247.

Such also is the rule laid down by American Jurisprudence, viz.:

"It is sometimes provided in compensation acts that the finding of the administrative tribunal as to certain facts or issues shall be final, or that findings of fact generally, in the absence of fraud,

shall be conclusive. Such a provision is operative, however, only where the finding is supported by evidence."

58 *Am. Jur.* 882, Sec. 483.

The Alaska Act on this topic reads:

"An Award by the full Board shall be conclusive and binding as to all questions of fact; but, either party to the dispute, within 30 days from the date of such award, if the award be not in accordance with law, may bring injunction proceedings, mandatory, or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award."

Sec. 43-3-22, ACLA 1949.

Appellee Lathourakis having adduced no evidence at the hearing to support the Board's findings, they are neither conclusive nor binding, and the lower Court should have set them aside.

The Illinois court so held under similar language of its act.

"If the coroner's verdict in this case is held to be competent evidence, it is as clear as any proposition can well be made that plaintiff in error is to be held liable upon the declarations of Cloyes, now deceased, made at a time when he was a real party in interest and in his own interest, and without the sanction of an Oath, and under circumstances that the declarations could not possibly be met or refuted by plaintiff in error by other evidence, or even by the right of cross-examination. This is so because the circuit court and this Court, under our Compensation Act, can only pass upon

questions of law, and cannot reverse the order of the Industrial Commission for insufficiency of the evidence, unless we can say that there is no competent evidence in the record tending to support such order. It is equally clear that there was no competent evidence before the coroner's jury or the Industrial Commission showing or tending to show that the injury to the deceased arose out of and in the course of his employment, unless we hold that the unsupported verdict of the coroner's jury is competent evidence for such purpose. Plaintiff in error was not a party to the proceedings before the coroner's jury, was not present and had no right to be present or represented in that proceeding, had no choice or right of choice in the selection of the jury, did not cross-examine and had no right to cross-examine the witnesses before that jury, or to contradict the evidence tending to prove the liability against it which it is claimed the verdict of that jury now establishes. To hold that that verdict has that effect is to condemn plaintiff in error without a hearing, and to violate the most elementary and sacred rules for the administration of justice between private individuals, guaranteed by our laws and our Constitution, both state and national."

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. 606, 6 ALR 543;

Libby, McNeill & Libby v. Board, 11 AR 327, 333.

This doctrine is also at least impliedly sustained in

Phillips v. Industrial Commission, 61 NE 2d (Ill.) 681, 172 ALR 372, 377.

Appellant contends that even Lathourakis' incompetent evidence does not show his temporary total disability continued until May 20, 1949, and that, in any event, the Board's finding is not conclusive upon this or the lower Court unless it is based upon the weight of competent evidence.

(B) COMPETENT EVIDENCE PROVED APPELLEE LATHOURAKIS SUFFERED NO PERMANENT DISABILITY FROM HIS INJURY.

Question 1 (Points 1-5, R. 130-131).

The two unverified letters of Dr. Williams and the one unverified letter of Dr. Slyfield constitute all of appellee Lathourakis' medical expert evidence.

Dr. Thorburn S. McGowan's Deposition.
R. 40-41.

The appellant adduced on its behalf by deposition the medical expert evidence of Dr. Thorburn S. McGowan (R. 40-81) and of Dr. A. Bernard Gray (R. 84-109), both of whom were subjected to rigid cross-examination by appellee Lathourakis' attorney. (McGowan Cross-Examination, R. 59-75; Re-Cross Examination, R. 77-80, also 81; Gray Cross-Examination, R. 93-107).

Dr. McGowan was entirely disinterested and was the surgeon of the Surgical Services in the United States Marine Hospital of the United States Public Health Service, Seattle. (R. 40).

He performed the operation. (R. 48).

He testified that the operation was an exploratory thoracotomy and an exploration of the mediastinum and upon the esophagus. (R. 49-50; also 54).

Dr. McGowan testified that the chest and the right arm would have equal recuperative qualities under a blow of equal force; that he didn't think that a blow to the chest, which did not injure any of the organs in front of the esophagus, could have resulted in the condition which he found in Lathourakis' esophagus for the reason that in his experience any severe blow to the chest should cause first a fracture of the ribs or sternum, and that the esophagus is the most protected organ in the chest and is surrounded by other organs and by loose tissue which would take up any actual blow; that Lathourakis had no such fractures; that it is not conceivable for the esophagus to be directly injured by any external blow unless the blow penetrates the chest; that in his opinion Lathourakis' vomiting and regurgitation, after the injury, did not cause the condition which he found in Lathourakis' esophagus, and that the thickness of the walls of Lathourakis' esophagus which was found three months from his injury could hardly have developed into such a condition if not already pre-existing.

That Lathourakis has in his esophagus the same kind of glands that are normally present in the stomach, which is the reason why he can get the equivalent of a stomach ulcer in his esophagus. Those glands have been present to a certain degree from Lathourakis' birth, and would not have been caused by the blow or by Lathourakis' vomiting after the accident; they were present congenitally; that the

conditions so found upon the thoracotomy sufficiently explained the condition of the stricture and Lathourakis' difficulty in swallowing food which is another reason why he felt the blow in July, 1948 did not cause the condition. Lathourakis definitely had a strictured condition which was present when he was first examined by Dr. Webber in August, only one month or less than a month from the time he was injured. Even when people swallow caustics such as lye, a stricture rarely develops that rapidly. A complete stricture rarely develops that rapidly. So obviously I feel he had had this condition for a considerable period of time. Furthermore, the stricture develops because scar formation has to occur, which scar formation occurs slowly and because of that I feel that the process had been going on for a considerable period of time. The body tries to repair the ulcer and a scar results. Then over a considerable period of time the scar contracts and you get what we call a stricture or a narrowing of the esophagus. (R. 54-57).

He also testified:

"Q. Assuming that we have a compression of the upper abdomen following an accident such as Mr. Lathourakis had, and this forced the gastric contents from the stomach into the esophagus, and you had a narrow esophagus at that particular point. Wouldn't such a happening aggravate this abnormal condition that you spoke of, that has existed in the lower end of the esophagus?

A. Only temporarily, sir.

Q. But it would aggravate it?

A. I think to a certain extent, for a matter of a day or so, yes." (R. 65).

He also testified:

"Q. I think you have spoken of esophagitis?

A. That is an inflammatory affair; that is an inflammatory affair in the lining of the esophagus.

Q. Would you expect to find esophagitis following such an accident?

A. If he had a normal esophagus, you would except to find a temporary, acute flare-up, but not the chronic condition that we found in his case, sir.

Q. Now, if you superimpose the fact of the abnormal esophagus a further strain,—a further strain upon the already weakened wall in the esophagus, then you would have a worse condition than would have been produced otherwise; isn't that true?

A. I don't believe so, sir. For instance, you say, 'A strain upon the already weakened wall in the esophagus.' I don't think that the wall was weakened at all. The wall was contracting down; it was cutting down; it was thicker than usual, but it was not a weakened wall." (R. 66-67).

He also testified:

"Q. Can you say that a crushing blow such as Mr. Lathourakis had to his chest did not compress his upper abdomen? Can you say that?

A. I feel, if it had, he should have had some evidence of injury there, which apparently no one has found.

Q. What evidence would you find?

A. I think you should find bruising of the upper abdomen. You might find a scratch, if it had been abraded. I think you would be expected to find it very sore; and his complaint to the

doctors and to me was about his chest, and he didn't complain of his abdomen hurting.

Q. Did he tell you that he was black and blue in the chest and in the arm?

A. He said his chest was discolored, and that his arm was discolored." (R. 67-68).

He also testified:

"Q. Then a lot depends on the extent of the blow that you have to the chest and upper abdomen.

A. I disagree with you there. You are talking about the upper abdomen. A blow to the chest, I don't believe, will rupture the esophagus. I don't think it will rupture the esophagus until it has broken many ribs, and until it has very probably ruptured other organs. Actually you will find you get punctured lungs, and that you would get damage to other organs before you would get damage to the esophagus." (R. 69).

He also testified:

"Q. Do I understand that you take the position that Mr. Lathourakis did not have a blow following this accident to the upper abdomen?

A. In my opinion sir. The history which he gives to some five or six various people here in no place refers to a blow to the upper abdomen. He told me personally that he struck his chest and right arm. I don't know anything about a blow to his upper abdomen, because he has never complained to me about it." (R. 70).

Dr. McGowan's testimony throughout positively shows that in his opinion appellee Lathourakis' in-

jury did not cause the condition in his esophagus for which the operation was performed.

He further testified that such permanent disability as Lathourakis would suffer was due to the operation, not to the injury, and furthermore that that permanent disability, upon full convalescence, would be between 20% or 30%, (not 50% as found by the Board).

By this testimony Dr. McGowan upon oath disputed and contradicted the unsworn ex parte letters of Drs. Williams and Slyfield, neither of whom, according to the records, ever had treated or examined appellee Lathourakis as a patient, but simply for the purpose of bolstering up Lathourakis' claim against appellant, whereas Lathourakis as a seaman was McGowan's patient as a United States Public Health Service surgeon. (R. 45).

Dr. McGowan testified:

"Q. Doctor, when Mr. Lathourakis has completely convalesced, if he had not at the time you saw him, would you give any opinion as to any permanent disability which would remain to him?

A. Yes sir. I think Mr. Lathourakis will have a definite partial disability which will include an inability to do certain types, or, rather, to eat certain types of food which may produce more gas than usual, and the possibility that he may develop further ulcerations of any abnormal glands which he has.

Q. In terms of a man being able to work, could you give us any percentage?

A. I would rate Mr. Lathourakis at the present time, or, excuse me, at the time of his com-

plete convalescence as being between twenty and thirty percent disabled.

Q. How much was he disabled when you saw him last?

A. At the present time I could not tell you, but I could get it from the records, if you would be interested, sir.

Q. You do not know at the present time?

A. At the present time, sir, I have not seen him for, I think, at least a month; so I could not tell you what his disability is.

Q. But you would assume that it would be more than twenty or thirty percent?

A. Yes.

Q. Around thirty to forty?

A. I would assume it would be around forty percent." (R. 80-81).

Dr. McGowan's testimony was corroborated by Dr. A. Bernard Gray whose testimony was given by deposition, subject to cross-examination. (R. 93).

Dr. McGowan testified positively that in his opinion appellee Lathourakis' condition was not due to any blow received in the accident. (R. 56-58; also R. 61; also R. 70; also R. 79-80).

Dr. McGowan also testified that in his opinion appellee Lathourakis suffered some *permanent disability from the operation* (R. 52) which he estimated upon complete convalescence as being between 20% to 30% (R. 80-81) and that at the time of the giving of his deposition on July 7, 1949, at around 40%. (R. 81).

Dr. A. Bernard Gray's Deposition.
R. 84-109.

Dr. A. Bernard Gray who also gave his deposition (R. 83-110) was the physician furnished by the appellant. (R. 106).

Dr. Gray is an experienced orthopedic and traumatic surgeon, engaged in practicing his specialty in Seattle since 1945 and having served as attending orthopedic surgeon for three years at the Permanente Foundation Hospital in Oakland, California, where he had charge of the section handling fractures and injuries, being in charge of two hospitals totaling approximately 400 beds. (R. 85). He was first consulted by appellee Lathourakis on July 26, 1948, ten days after the latter's injury on July 16, 1948. Lathourakis told him that his right hand and arm had been caught between the mast and the barge and his forearm had become very painful, swollen and discolored; also that he had been struck over the chest by the mast, but since then he had had no pain but had difficulty swallowing heavy foods, especially meat. (R. 86).

On that occasion Dr. Gray stated that at that time he had an X-Ray taken of Lathourakis' right arm which was encased in a short plastic cast; but the X-Rays revealed no evidence of fracture but that the forearm bones were intact, so the cast was removed; but that the forearm was extensively swollen showing many areas of healing abrasions and of patchy discoloration. The swelling extended from the fingers to above the elbow. Tenderness which was present

throughout was extensive and was marked. There was about 50% limitation of finger and wrist joint motion. There was muscle weakness. (R. 86-87). Dr. Gray further stated that he examined Lathourakis' chest wall and there was neither discoloration nor local tenderness. (R. 87).

Dr. Gray stated he thought that Lathourakis' complaint of inability to swallow meat was made to him by Lathourakis on the second day and after he had finished his original examination. (R. 88; also R. 94).

Lathourakis' complaint of inability to swallow meat caused Dr. Gray to feel the complaint should be investigated further and that X-Ray studies should be made of Lathourakis' esophagus, which X-Rays were taken revealing an organical lesion which had the appearance of carcinoma. (R. 88).

Dr. Gray then referred the patient to Dr. Julius Webber. (R. 88).

Those clinical X-Ray findings were such that Dr. Gray felt that Lathourakis should have surgical treatment to the esophagus and he referred him to a specialist along those lines. Arrangements were finally made that Lathourakis should go to the Marine Hospital. (R. 88; also R. 100-101).

Dr. Gray was of the opinion that the condition of the esophagus was unrelated to the injury and he so advised Lathourakis and suggested to him that he would have to seek medical care of his own. (R. 89). Dr. Gray reiterated that no X-Rays were taken of

the chest, that there were no local signs of injury or tenderness to indicate the necessity of taking X-Rays of the chest, but that X-Rays were ordered of the esophagus.

He further stated:

> "Q. Now, did you have something further to say, or did I interrupt you in your diagnosis and opinion?
>
> A. Yes. I made an opinion, as I felt that I was entitled to make an opinion despite the fact that I am not a specialist in the diseases of the esophagus. I based my opinion mainly on two things.
>
> In the first place, I have seen innumerable injuries to the chest, and I have never seen a complication involving the esophagus.
>
> In the second place, there was no objective evidence when I examined him ten days after the injury, of any injury to the chest wall.
>
> And, thirdly, the fact that the pathological diagnosis indicated a pre-existing condition; and I offer that opinion for what it is worth." (R. 91-92).

Dr. Gray further stated "Well, I felt that he would have been fit to return to work approximately October 1, 1948, although I didn't see him for at least four weeks prior to that time. I felt that the period of disability was reasonable, and I would expect, barring any other complications, full return of the function in that time." (R. 92).

Dr. Gray stated several times that the operation was performed only to cure the condition of the esophagus,

but added thereto was his presumptive diagnosis of carcinoma. (R. 103).

He also frankly admitted that he did not claim to be a specialist in the diseases of the esophagus, but was a specialist in traumatic surgery. (R. 106).

However, throughout his testimony he positively contended that the *condition of Lathourakis' esophagus was not due to the latter's injury sustained on July 16, 1948.*

Dr. Gray thus upon oath contradicted Drs. Williams' and Slyfield's unsworn letters both as to Lathourakis suffering any permanent disability from his accidental injury and also as to his temporary total disability not having ceased by October 1, 1948.

This medical testimony of Drs. McGowan and Gray is at least impliedly corroborated, whereas the truth of Drs. Slyfield's and Williams' unsworn statements is at least impliedly challenged by Lathourakis having worked during the 1949 Bristol Bay salmon fishing season as a gill net fisherman during which he earned $1,528.67 and when he and his fishing partner caught 8400 fish. (R. 111).

The testimony of the witness Sheils does not in anywise challenge the truth of Dr. McGowan's and Dr. Gray's testimony. The fact is conceded by all that Lathourakis did undergo a very serious operation in the fall of 1948 and Dr. McGowan himself testified that upon convalescence therefrom Lathourakis would probably have *permanent disability of from 20% to*

30% as a result of that operation, in his ability to work. (R. 80-81).

With this evidence before it the Board found that appellee Lathourakis had suffered temporary total disability to May 20, 1949 (Award, R. 16); which was affirmed by the Judgment allowing 307 days of temporary total disability compensation (R. 125), notwithstanding that Dr. Williams stated in his letter of March 23, 1949, that Lathourakis' condition had become fixed on March 22, 1949 (R. 118), and notwithstanding that Dr. Gray testified that in his opinion Lathourakis' recovery from his injury would occur on October 1, 1948. (R. 92).

On this evidence the Board found that Lathourakis had suffered 50% permanent disability (Award, R. 17) which was affirmed by the Judgment (R. 125), notwithstanding that Dr. Williams fixed it at 65% for unspecified permanent partial disability and 20% to the forearm in his letter of March 23, 1949 (R. 118), and at the same percentage except to change the 20% to 25% in his letter of May 20, 1949 (R. 37-38), and notwithstanding that Dr. Gray had stated and testified that in his opinion Lathourakis made recovery from his injury on October 1, 1948 (R. 92), and Dr. McGowan stated that appellee Lathourakis' permanent partial disability from the result of his operation would only be 20% to 30%. (R. 81).

Appellant is so confident that no challenge can be successfully sustained against the competency of its evidence adduced by Doctors McGowan and Gray that

it does not feel justified in extending this brief by citing authorities in support thereof.

Furthermore appellant already has cited many decisions in proof of its contention that all of the evidence adduced on behalf of appellee was incompetent and that the general rule is that a finding made by such a tribunal as the Alaska Industrial Board is not conclusive when it is based upon incompetent evidence; hence, appellant submits that those decisions are also authoritative support for its contention in this section of its brief that the competent evidence adduced at the hearing proved that appellee Lathourakis suffered no permanent disability from his injury.

TEMPORARY TOTAL DISABILITY AND PERMANENT, PARTIAL OR TOTAL, DISABILITY CANNOT BE SUSTAINED AS A RESULT OF ONE AND THE SAME INJURY.

Question 2. (Point 6, R. 132.)

The Act sets upon a schedule of compensation payable for total and permanent disability.

See Subsections a, b, c, d, and e, Section 1, Appendix A, Page 7, infra.

Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears also constitutes total and permanent disability compensable in accordance with the foregoing subsections (a), (b), (c), (d), and (e).

See Section 1 of Act, Appendix A, Pages 11-12, infra.

The Act recognizes that injuries may be permanent in character, yet not totally but only partially disabling; hence provides that permanent, partial disability shall be compensated only proportionately to permanent, total disability as follows:

"Whenever such employee receives an injury arising out of and in the course of employment as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars.

"To illustrate: If said employee were of a class that would entitle him or her to Seven Thousand Two Hundred Dollars under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her earning capacity twenty-five percentum, he or she would be entitled to receive One Thousand Eight Hundred Dollars, it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars that twenty-five per centum does to one hundred percentum. Should such employee receive an injury that would impair his or her earning capacity seventy-five per centum, he or

she would be entitled to receive Five Thousand Four Hundred Dollars, it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars that seventy-five per centum does to one hundred per centum."

See Section 1 of Act, Appendix A, Page 12-13, infra.

The Act also specifies that the loss of certain members of the body, shall constitute partial permanent disability, namely: The loss of a thumb, an index finger, any other finger, a great toe, any other toe, a hand, an arm, a foot, a leg, an eye, an ear, and a nose; and prescribes definite compensation under varying circumstances for such respective losses. Permanent total loss of use of any such member is compensated the same as the loss of such member.

See Section 1 of Act, Appendix A, Pages 8-10, infra.

The Act does not define temporary disability but it cannot be less than total loss of earning capacity:

"When Right to Compensation Accrues. No compensation shall be paid hereunder for an injury which does not incapacitate the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred, but if incapacity extends beyond such period compensation shall commence on the second day after the injury. * * *"

See Section 8 of Act, Appendix A, Page 21, infra.

Compensation payable for temporary disabling injuries is

> "for all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, 65 per cent of his daily wages."
>
> Section 1 of Act, Appendix A, Pages 10-11, infra.

The Act specifically limits total compensation for partial permanent disability to $7200.00; for total permanent disability to $9,000.00.

> See Section 1 of Act, Appendix A, Page 12, also 5, 7, infra.

The Act fails to specify the total compensation that may be paid for total temporary disability; but seemingly it must be limited by the $7200.00 total compensation payable for partial permanent disability, or at least by the $9000.00 payable for total permanent disability because it would be illogical to pay for a lesser disability a greater compensation than is payable for a greater disability.

Furthermore by Section 4 of the Act (Appendix A, Page 18, infra) the Board's award of an increased rate of compensation is "subject to the maximum or minimum provided in this schedule." Hence, undoubtedly, in any event, compensation for temporary disability is limited to $9,000.00, the highest amount payable under the Act.

Section 1 of the Act contains different schedules, namely: for death, for total permanent disability,

partial permanent disability, and temporary disability; in fact provisions relative to them are intermingled and interjected into the section without any continuity of subject.

The Act provides:

> "And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, *relating to cases other than temporary disability,* the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provisions in this schedule." (Emphasis supplied).

See Section 1 of Act, Appendix A, Page 11, infra.

This provision in the 1915, 1923, 1927, and 1929 Acts reads:

> "And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, *and the employee has been paid compensation for temporary disability,* the amount so paid him shall be *deducted from* the amount to which he shall be entitled under such provision in this schedule." (Emphasis supplied).

Sec. 1, p. 151, Ch. 71 ASL 1915;
Sec. 1, p. 241, Ch. 98, ASL 1923;
Sec. 1, 154, Ch. 77, ASL 1927;
Sec. 1, p. 52, Ch. 25, ASL 1929.

Thus, the words "in addition to", instead of the words "deducted from," were first used by, and the

clause "and the employee has been paid compensation for temporary disability" was first omitted from the present or 1946 Act.

See Section 1, Appendix A, Page 11, infra.

Had the legislature intended that "temporary disability compensation," already paid, should not be deducted from such partial or total disability compensation as was later paid or payable to the injured employee, then it would simply have changed the words "deducted from" to "in addition to."

But, that was not the legislature's intent; hence, it also by the 1946 Act struck out and eliminated the words "and the employee has been paid compensation for temporary disability," so as to clearly indicate that the words "the amount so paid him" did not mean such sum as had been paid the employee as "compensation for temporary disability"; otherwise, there was no sense in changing the clear statute, into ambiguity, because had the words "and the employee has been paid compensation for temporary disability" been retained in the statute, then the words "the amount so paid him" probably could have been held to refer back to the opening sentence in this same paragraph, i.e.: "for all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, 65 per cent of his daily wages."

The juxtaposition of the last quoted sentence to the other language in this particular subparagraph of Section 1 of the Act, which was so amended by the

1946 Act, is without significance in view of the awkward intermingling of different subparagraphs, subsections and provisions throughout Section 1 of the Act without regard to continuity or logical sequence or antecedence of similar or dissimilar purposes thereof.

Clearly the legislature by eliminating the words "and the employee has been paid compensation for temporary disability" intended that the retained words "relating to cases other than temporary disability" should make the entire provision beyond any question of doubt inapplicable to injuries for which temporary disability compensation is payable, and to provide for the contingency of an injury eventually but unpredictedly actually resulting in two distinct classes of compensatory injuries, for example: An unmarried man loses a thumb for which he is paid $720.00 but complications set in and he loses an index finger for which he is paid $450.00, and further complications set in causing him to lose his remaining fingers, so he is paid $270.00 each or $810.00 more for them. By using the words "in addition to" the employee is assured of receiving the total compensation of $1980.00.

Thus appears the necessity of changing the words "deducted from" to "in addition to," because, otherwise, if the words "and the employee has been paid compensation for temporary disability" had been excluded, without changing "deducted from" to "in addition to" the absurd result might have been that

the employee would have been entitled to receive only the last $810.00 for the loss of his three fingers other than thumb and index finger.

In this particular example, the employee doubtless under Section 4 of the Act (Appendix A, page 18 infra) would be entitled to receive $2160.00 for the loss of a hand or total loss of use of a hand; but, if so, then from that $2160.00 would be deducted the $1980.00 previously paid him. He certainly wouldn't be entitled to be paid both the compensation of $1980.00 for the individual loss of his thumb and four fingers, plus $2160.00 for the total loss of his hand. This contention, appellant submits, is supported by this Court's decision in

Fern G. M. Co. v. Murphy, 7 F. (2d) 613, 614, 5 A.F.R. 275, 277.

The words "the amount so paid him" therefore must mean the compensation paid him at the rate at which the injury was first rated for compensation, and before that injury had so developed as to disclose that it actually consisted of two or more distinct classes of compensatory injuries such as the aforesaid example of a loss of a thumb but complications from the injury later also causing the loss of a finger.

While the insertion of the word "other" between the word "some" and the word "provision" doubtless would have clarified its intention, yet this intention of the legislature is the only meaning that is consistent and consonant with Section 4 of the Act (Appendix A, page 18, infra).

Any other construction of this particular amended subparagraph of Section 1 of the 1946 Act would be directly contrary to the later expressed intention of Section 4 of the Act (Appendix A, page 18, infra), that compensation of a lower rating, paid under any subdivision or part of the schedule, shall be deducted from such, if any, compensation as is later paid upon that injury later being ascertained to be entitled to receive a higher rated compensation.

It will be noted that the words "this schedule" are used throughout the Act to mean the entire compensatory provisions.

See Sections 1, 4 and 6 of Act, Appendix A, Pages 2, 8, 11, 18, 20, infra.

The first sentence of Section 4 of the present Act reads:

> "If an injured employee entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under *same or* some other part *of* subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her." (Emphasis supplied).

This sentence in the 1915, 1923, 1927 and 1929 Acts read:

> "If any injured employee entitled to compensation *hereunder shall be paid compensation* under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or

was entitled to a higher rate of compensation under some other part *or* subdivision of this schedule then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her." (Emphasis supplied).

Section 4, Chapter 25, Laws of Alaska 1929, page 55;

Section 4, Chapter 77, Laws of Alaska 1927, page 156;

Section 2, Chapter 98, Laws of Alaska 1923, page 242;

Section 2, Chapter 71, Laws of Alaska 1915, page 152.

It appears that the 1946 Act omitted the words "hereunder shall be paid compensation," contained in the 1915, 1923, 1927, and 1929 Acts, and changed the word "or" to "of", and added the words "same or" which were not included in those former Acts. The omission of the words "hereunder shall be paid compensation" makes this sentence unintelligible; in fact, the compiler of Alaska Compiled Laws 1949 took the liberty of trying to cure this ambiguity by inserting the word "is" before the word "entitled". See Section 43-3-4, ACLA 1949, Volume 2, page 1231.

Appellant submits that in construing this sentence the omitted words "hereunder shall be paid compensation" must be read into it and that the Court has the power to supply them.

"Words or phrases may, however, be supplied by the courts and inserted in a statute, where

that is necessary to obviate repugnancy and incompetency in the statute, complete the sense thereof, and give effect to the intention of the legislature manifested therein."

50 *Am. Jur.* 222, 234.

This Court in construing the 1923 Act said:

"To say in a case of this kind that partial destruction of a hand is worse than the amputation of the member at the wrist is as inconsistent with the provisions of the law as it is to say that it is mathematically true that a part is greater than the whole."

Ketchikan Lumber & Shingle Co. v. Walker, 15 F. 772, 773, 5 AFR 321, 325.

Appellant submits that this principle applies to this case and that Lathourakis' temporary total disability could not possibly be greater than his permanent partial disability, because the latter is everlasting, whereas the former is sooner or later ending. Temporariness cannot be as much as permanency.

Furthermore, such, if any, compensation as might be paid or become due Lathourakis under that portion of Section 1 of the Act hereinbefore quoted (see page 51, supra), is subject to the specific limitation of the broad and inclusive language "under same or some other part of subdivision of this schedule," in Section 4 of the Act (quoted page 56, supra).

Furthermore, the payment of the "higher rated compensation," so contained in the quoted first sentence of Section 4, no matter for what classification

of disability, is specifically subjected to the latter restriction in the same sentence "after first deducting the amount that has already been paid" to the employee no matter for what previously lower rated classification of disability.

No exemption from that deduction is made of compensation previously paid for temporary disability, or for any other classification of disability.

The employee "shall receive such higher rate" of compensation; but he must credit thereon or deduct therefrom "the amount that has already been paid him or her."

Only one compensation is to be paid, but that must be at the highest rate to which the injury is entitled under the classification of disability in which it falls.

Under the Act should an unmarried man lose a hand, he suffers partial, permanent disability for which he is entitled to compensation of $2160.00. Should complications resulting from that same injury cause him to lose the arm of which that hand was a member, he then suffers total, permanent disability for which he is entitled to compensation of $6000.00. But, he is not entitled to retain the $2160.00 and be paid a further $6000.00. He is entitled to a total compensation of $6000.00; hence, the $2160.00 already paid him must be credited upon or deducted from the $6000.00 before the latter sum is paid him.

On the contrary, should an injury to an arm cause temporary disability for say one year, for which the

employee is paid compensation, computed at 65% of his daily wages, of $3900.00, he would not be obliged to refund any part of that $3900.00 if at the end of the year complications cause the loss of the arm by amputation resulting in the employee suffering partial permanent disability, for which he is entitled to compensation of $2700.00, because the latter sum is smaller than the former.

But, he is not entitled to be paid both the $3900.00 and the $2700.00, because before being paid a higher rate of compensation Section 4 of the Act requires him to deduct "the amount that has already been paid him" (page 56, supra). Nor is he obliged to return any part of the $3900.00 because Section 4 also states, "no such review shall affect such award, order or settlement, as regards any monies already paid."

He undoubtedly therefore would retain the $3900.00 and would not ask for payment of the $2700.00 inasmuch as the law does not require him to do so and humanly he would accept the larger amount.

The present Act's elimination from the quoted subparagraph of Section 1 (page 52, supra) of the words "and the employee has been paid compensation for temporary disability" gives an entirely different meaning than what was or could have been ascribed to the hereinbefore quoted somewhat analogous subparagraph of Section 1 of the 1915, 1923, 1927, and 1929 Acts (page 52, supra).

These particular words, after having been in that sentence for some 31 years, were omitted by the 1946

legislature. Presumably that must have been omitted for some purpose. While the present Act (Appendix A, pages 1 and 52, infra), purportedly repeals the former acts, yet we submit that to it is applicable the rule in the event of omission of words from an amendatory statute, namely:

> "The omission of a word in the amendment of a statute, will be assumed to have been intentional. Where the meaning of the prior law is intended to be continued, its terminology is also usually continued, so that an omission of words implies an intended change in the meaning of the statute. Under these rules, the courts may not aid a restriction found in a prior statute, but omitted from a later one. Where it is apparent that substantive portions of a statute have been omitted by process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, and not merely clerical and inconsequential, because that would in effect be the enactment of substantive law."
>
> 50 *Am. Jur.*, 263, 276.

With those words in the statute to modify or explain not only the next preceding clause, "relating to cases other than temporary disability," but also the immediately following clause, "The amount so paid him . . .", both of which clauses are retained in the 1946 Act, the statute could well mean, i.e.: Should an injury, first supposed to be sufficiently serious to cause only temporary disability, later develop into either partial or total permanent disability, then the injured employee would be entitled to be paid the rate of

compensation under the schedule for such partial or total permanent disability; but, if he had already been paid temporary disability compensation (when it was still supposed his injury caused only temporary disability), then, the amount of such temporary disability compensation would be deducted from, under the 1915, 1923, 1927, and 1929 Acts, and under the 1946 Act would be retained by the employee or "added to," the compensation paid him for such partial or total disability.

Very apparently such was the procedure followed under the 1915 Act and at least impliedly approved by this Court in

Fern G. M. Co. v. Murphy, 7 F. (2d) 613, 614, 5 AFR 275.

But the 1946 legislature plainly didn't intend that such meaning should be ascribed to the statute, and therefore omitted the words, "and the employee has been paid compensation for temporary disability," but retained the words, "relating to cases other than temporary disability," so as to clearly state that this particular provision had nothing whatever to do with temporary disabling injuries, but only to either partial or total permanent disability.

While workmen's compensation acts are to be liberally construed, the plain, clear, statutory intent is not to be ignored.

The Alaskan act creates three classifications of disabilities, i.e.: temporary, partial permanent, and

total permanent for which different rates of compensation are payable but it does not authorize payment of more than one compensation for the disability, in whichever classification it falls, caused by one injury. Nor can the Alaska Act result in the absurdity, criticized by the U. S. Supreme Court, which apparently might be possible under the Harbor Worker's and Longshoreman's Act unless construed in the manner that Court did in

Baltimore & Philadelphia Steamboat Co. v. North, 284 U.S. 408.

The denial to Lathourakis of two disability compensations for one injury does not in any wise prevent him from claiming and receiving compensation for the highest rated compensation to which his injury entitled him.

Section 8 of the Act provides:

> "No compensation shall be paid hereunder for an injury which does not incapacitate the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred, but if incapacity extends beyond such period compensation shall commence on the second day after the injury."
>
> Appendix A, page 21, infra.

Thereby plainly stating that disability compensation is dependent upon loss of full earning capacity.

Similarly did the New York Statute.

Judge Pound in construing that statute said in substance that concurrent and consecutive compensation

awards violated the plain meaning of the New York Act that the injured employee should be compensated for his disability.

Markhoffer v. Markhoffer, 111 NE 379, 380;
Bethlehem Shipbuilding Corporation v. Monahan, 54 F(2d) 349, 350.

The Markhoffer decision was distinguished by the United States Supreme Court in the *Baltimore and Philadelphia Steamboat Co. v. North* case from the facts before it, but we submit even so did not hold that an injured employee could be awarded both total temporary disability and partial permanent disability compensation for one and the same injury under a statute similar to the Alaska Act.

The Alaskan Act, as seen, specifically directs the payment of the highest rated liability compensation, and does not oblige, should such a situation occur, the employee to accept a lesser sum than that which he has already been paid.

Furthermore if the quoted sub-paragraph of Section 1 is otherwise construed than as herein contended it is inconsistent with the provisions of Section 4 of the Act by which the former is necessarily controlled.

"In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails."

59 *CJ* 999.

"There are cases in which an enumeration of particular things in a statute is held to be lim-

ited by general terms following the particular enumerations."

50 *Am. Jur.* pp. 248, 251.

The Act itself does not define the words "compensation rate," "higher rate of compensation," or "decreased rate of compensation."

Seemingly those expressions may be used in either or possibly both of two ways, viz.:

"Compensation rate" means: (A) either the actual money paid to the employee, or, (B) the classification of the injury itself.

"Higher rate of compensation" means: (A) either, more money is payable to the injured employee than first awarded, or, (B) the injury develops into more seriousness than at first found.

"Decreased rate of compensation" means: either (A) less money is payable to the injured employee than first awarded, or (B) the injury is found to be of less seriousness than at first found.

The Board's first finding (R. 16) that Lathourakis suffered total temporary disability until May 20, 1949, affirmed by judgment in allowing 307 days total temporary disability (R. 125), is actually obliterated by its subsequent finding, although in the same award, that he is 50% permanently disabled under the well known rule that, if two statements are inconsistent with each other, the last in point of time controls.

The judgment awarded appellee Lathourakis temporary total compensation of $2005.00 which is in

addition to the $1050.80 already paid him by appellant (R. 125) and also 50% permanent disability compensation of $3600.00.

In money terms certainly $3600.00 is a higher rate of compensation than the sum of $2005.00 plus $1050.80.

Furthermore, logic bespeaks that a 50% permanent disability is a more serious injury than temporary disability no matter how long prolonged, because the temporary disability necessarily eventually will cease; therefore, that a 50% permanent disability rating is a higher rate of compensation than is temporary disability.

Seemingly, the larger amount and the higher rated disability compensation controls the lesser, not only because larger in size but because last in expression both in award and judgment.

Clearly under Section 4 of the statute, if on Monday the Board at a hearing had given appellee Lathourakis a compensation rating of temporary total disability for 307 days with compensation of $3055.80 but at another hearing a week later had made a finding that Lathourakis had suffered 50% permanent disability with compensation of $3600.00, before appellee Lathourakis could compel payment of the $3600.00 he would have to give credit for the $3055.80 because Section 4 states in effect that before he would be paid the higher rate he must first deduct the amount that has already been paid him. (Appendix A, page 17, infra.)

Surely the plain purpose of the Act cannot be discarded simply because at a single hearing the Board first found that Lathourakis was entitled to temporary total disability and then found that he was also entitled to 50% permanent disability compensation.

Moreover, Section 4 of the Act specifically provides that on such review before the Board the latter "may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered or agreed to, *subject to the maximum or minimum provided in this Act.*" (Emphasis supplied.)

Appendix A, Page 18, infra.

While it is true that this court has held that an injury to a leg may result in total and permanent disability and therefore entitled under the 1915 Act to higher compensation rating than the loss of the leg itself

Fern G. M. Co. v. Murphy, 7 F(2d) 613, 614, 5 AFR 275, 277

it did not hold that the employee could recover both the compensation for the loss of the leg and the compensation for total and permanent disability.

Both the District Court and the Board held that Lathourakis sustained, out of the same and one only injury, both temporary total disability for more than 300 days and also 50% permanent disability, and that he was entitled to be paid compensation for each even though their total exceeds the maximum compensation allowed by the law for either rated compensation.

Appellant submits that, assuming but not admitting that it had been proved by competent evidence, appel-

lee Lathourakis can have either $3055.80 ($2005.00 allowed by court [R. 125] plus the $1050.80 already paid him, totalling $3055.80), or else he can take the $3600.00; but he can't have both because then he is being paid two compensations for one injury in a total in excess of the maximum allowed by the Act at whichever of those two disability compensation ratings is correct.

ATTORNEY FEE NOT TAXABLE AS COSTS AGAINST UNSUCCESSFUL LITIGANT ON APPEAL TO DISTRICT COURT FOR REVIEW OF ALASKA INDUSTRIAL BOARD'S AWARD.

Question 3 (Point 7, R. 132).

The District Court in its judgment allowed as costs an attorney fee of $350.00 to appellee Lathourakis (R. 125) for the services of his attorney in the proceedings before the District Court.

The error of this allowance is the subject of Appellant's "Statement of Points" 7. (R. 132).

This $350.00 attorney fee should not be confused with the $1100.00 attorney fee allowed by the Board in its award (R. 18), the invalidity whereof appellant challenged in subparagraph 4 of Paragraph IX of its "Complaint and Appeal" (R. 7), which contention appellee Lathourakis conceded by his not denying that subparagraph in his Answer. (R. 19).

Alaska has no statute under which an attorney fee can be allowed as an item of costs to the successful litigant, unless under the general statute providing:

> "Disbursements allowed to party entitled to costs. Party's right to witness' and attorney's

> fees. A party entitled to costs shall also be allowed for all necessary disbursements, * * * * *; * * * * * and a reasonable attorney's fee to be fixed by the Court."
>
> Sec. 55-11-55, ACLA 1949.

The words "and a reasonable attorney's fee to be fixed by the Court" were included in the statute by amendment in 1947.

> Ch. 84, ASL 1947.

The same words were in Section 1, Ch. 38, ASL 1923, which were construed in this Court's decisions.

> *Pond v. Goldstein,* 41 F. (2d) 76, 5 AFR 544, 556;
>
> *Forno v. Coyle,* 75 F. (2d) 692, 5 AFR 758, 766.

Appellant does not contend that Sec. 55-11-55, ACLA 1949, is invalid. It contends that that Statute is not applicable to this proceeding which was an appeal for review by the District Court of a decision and award by the Alaska Industrial Board in favor of an injured employee under the Alaska Workmen's Compensation Act. (Full text, Appendix A).

This Court said, in discussing allowance of attorney's fee in a case where Ch. 58, ASL 1937, had amended Ch. 38, ASL 1923, by removing the words "and a reasonable attorney's fee to be fixed by the Court" two days before entry of judgment, viz.:

> "The assignment is well taken. The right to costs is purely statutory. No such right existed at common law. Day v. Woodworth, 13 How. 363,

372, 14 L.ed. 181. No party is entitled to costs until he prevails in the suit, in other words, until judgment is entered. Whatever the statute provides at that time is the measure of his allowable costs. As was said in Begbie v. Begbie, 128 Cal. 154, 155, 60 P. 667, 49 LRA 141:

'The right to recover costs exists by virtue of statutory provision. * * * * * and their recovery is governed by the statute in force at the time the right to have them taxed accrued.' "

Mutual, etc., Ass'n. v. Moyer, 94 F. (2d) 906, 9 Alaska Reports 235, 240, cer. den. 304 US 581.

Section 10 of the Workmen's Compensation Act of Alaska provides:

"Right to compensation exclusive. The right to compensation for an injury and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and *no rights or remedies, except those provided for by this Act, shall accrue to employees* entitled to compensation under this Act while it is in effect. * * * * *" (Emphasis supplied).

Appendix A, Page 22, infra.

Section 17 of the Act further says:

"* * * * * * In all proceedings before the Industrial Board or in any Court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court."

Appendix A, Page 32, infra.

Appellant contends that this provision is solely procedural, providing only for the manner of awarding and taxing costs, and not a statutory authorization that attorney's fees may be taxed as costs.

Appellant contends that such conclusion is logically premised upon the subsequent language in Section 23 of the Act, and that such later language is a specific limitation upon and restriction of the quoted language from Section 17, if it can be construed as a grant of authority, namely:

> "The fees of attorneys and physicians, and the charges of nurses and hospitals, for services under this Act shall be subject to the approval of the Industrial Board. When any claimant for compensation is represented by an attorney in the prosecution of his or her claim, the Industrial Board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fees. The fee so fixed shall be binding upon both the claimant and his or her attorney, and *the employer shall pay to the attorney out of the award* the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award. * * * * *" (Emphasis supplied).
>
> Appendix A, Page 39, infra.

This language, appellant submits, distinctly shows that the legislature intended that the injured employee should not receive additional compensation by way of attorney's fees in any proceedings under the Act either before the Board or the District Court.

In this instance, it happens that the unsuccessful litigant is appellant who was the employer. But sauce for the goose should be sauce for the gander. It is entirely possible that an injured employee might be, in fact in instances he has been, the unsuccessful litigant on such an appeal. It scarcely seems possible that the Workmen's Compensation Act intended, should an injured employee appeal to the District Court from what he thought was an erroneous decision of the Board, that he might be charged with the fee of the employer's lawyer in that review or appeal proceedings should the District Court sustain the Board's decision.

Appellant concedes the dearth of authority on this question, which has not to its knowledge previously been presented to this Court, but it maintains that the provisions of Section 55-11-55, ACLA 1949, supra, are inapplicable in this proceeding in the absence of specific authority for the application thereof by the Workmen's Compensation Act and in view of the latter's specific restriction of attorney fees to be paid out of the awarded compensation under Section 23 of the Act (page 71, supra); hence, that the District Court was without jurisdiction in its judgment (R. 125) to adjudge that appellant should pay appellee Lathourakis an attorney fee of $350.00.

Appellant submits that the lower Court's previous decision in

United Benefit Life Ins. Co. v. Elliott, et al.,
11 Alaska Reports 466, 476,

wherein it held that the plaintiff in an interpleader suit was not entitled to attorney fees as an allowable cost under then Section 4065, CLA 1933, which is now Section 55-11-55, ACLA 1949, supra, with the added amendments, spoken of in that decision, of Chapters 58, ASL 1937, and 84, ASL 1947, clearly shows that it could not allow the $350.00, or any sum, for attorney fees as allowable costs in this suit because this proceedings is not within the purview of the classes of cases mentioned in Section 55-11-52, ACLA 1949, formerly Section 4062, CLA 1933.

"Chapter 2, Title 56", mentioned in 2nd subparagraph of Section 55-11-52, ACLA 1949, is "Actions by and against Public Corporations", Sections 56-2-1 to 56-2-4, ACLA 1949, Code of Civil Procedure, Volume 3, ACLA 1949, formerly Chapter CII, Sections 3816 to 3819, ACL 1933.

"Chapter 4, Title 56", mentioned in 2nd subparagraph of Section 55-11-52, ACLA 1949, is "Actions to Avoid Charters and to Prevent the Usurpation of an office or franchise and to determine the right thereto," Sections 56-4-1 to 56-4-14, ACLA 1949, Code of Civil Procedure, Volume 3, ACLA 1949, formerly Chapter CIII, Sections 3824 to 3837, ACL 1933.

CONCLUSION.

For the foregoing reasons appellant urges that the judgment of the District Court and the decision and award of the Alaska Industrial Board should be reversed and modified to holding that appellee Lathourakis' total temporary disability ended on October 1, 1948, for which he was entitled to be paid total temporary disability compensation of $1050.80 only, which was paid him prior to his making and filing his claim herein (R. 10), and that he sustained no permanent either partial or total disability whatsoever and is not entitled to be paid any permanent either partial or total disability compensation; and, that the judgment of the District Court should be reversed in the allowing appellee Lathourakis an attorney fee of $350.00, or any sum, as an allowable cost for the services of his attorney in the proceedings on appeal before the District Court.

Dated, September 6, 1950.

Respectfully submitted,

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ROBERT W. HOLLAND,
BOGLE, BOGLE & GATES,
Attorneys for Appellant.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

Compilation of Workmen's Compensation Act of Alaska, Chapter 9, SLA 1946, entitled

"AN ACT. Relating to the measure and recovery of compensation of injured employees in all businesses, occupations, work, employments and industries in the Territory of Alaska, except domestic service, agriculture, dairying and the operation of railroads as common carriers, and relating to the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such businesses and industries; providing for a second injury fund; creating an Industrial Board, and defining its duties; making the Territorial Department of Labor the administrative agency to carry into effect the provision of this Act; providing for penalties, and repealing Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska, 1933, as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 44, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937."

as amended by Chapter 45, SLA 1947, entitled

"AN ACT. Amending the Workmen's Compensation Act, Chapter 9, Session Laws of Alaska, 1946, to relieve minor surviving children in remote and isolated sections of the Territory from the consequences of failure to file a claim within the time prescribed by Section 29 of the Act.",

now compiled as Sections 43-3-1 to 43-3-39, ACLA 1949.

§43-3-1. **Employment covered: Compensation allowed: Death benefits: Total and permanent disability: Partial permanent disability: Disfigurement: Temporary disability: Loss of members: Amputations: Other permanent partial injuries: Payments to second injury fund: Fund beneficiaries: Refund of payments to fund: Injury causing permanent disability when combined with previous disability.** Any person, or persons, partnership, joint stock company, association or corporation, employing three or more employees in connection with any business, occupation, work, employment or industry, carried on in this Territory, including any department, agency or instrumentality of the Territorial Government, Municipality or Public Utility District, except domestic service, agriculture, dairying, or the operation of railroads as common carriers, shall be liable to pay compensation in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury arising out of and in the course of his or her employment or to the beneficiaries named herein, as the same are hereinafter designated and defined in all cases where the employee shall be so injured and such injuries shall result in his or her death.

(COMPENSATION ALLOWED.) The compensation to which such employee so injured, or, in case of his or her death, if death results from such injury,

such beneficiaries shall be entitled, and for which such employer shall be legally liable, shall be as follows:

(1) (AMOUNT OF DEATH BENEFITS.) In the event of the death of any such employee resulting from such injury, where such employee at the time of his death was married, his widow shall be entitled to receive the sum of Four Thousand Five Hundred Dollars ($4,500.00).

(2) (CHILDREN). In those cases where such married employees had a child or children under the age of eighteen (18) years at the time of his death, his widow shall be entitled to receive in addition to the sum above specified, the sum of Nine Hundred Dollars ($900.00) for each child under the age of eighteen (18) years, or child wholly dependent upon his or her parents for support by reason of mental or physical incompetency, or unborn or posthumous child, which such employee left at the time of his decease, but not to exceed in all the sum of Nine Thousand Dollars ($9,000.00).

(3) (DEPENDENT PARENTS.) In those cases where such employee left either father or mother or both, dependent upon him for support at the time of his death, the sum of Nine Hundred Dollars ($900.00) each shall be paid to such father or mother or both, in addition to the sum provided for and made payable to the widow. In no case, however, is the total sum to be paid hereunder to exceed the sum of Nine Thousand Dollars ($9,000.00) and the payments to which the widow and children may be entitled shall be first

paid out of said sum of Nine Thousand Dollars ($9,000.00).

(4) (NON-DEPENDENT PARENTS.) In those cases where such deceased employee was unmarried at the time of his or her death survived by either his or her father or mother, such father or mother shall be paid the sum of One Thousand Eight Hundred Dollars ($1,800.00); and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-five Dollars ($195.00) and such other expenses, if any, arising after the injury and before the death not to exceed One Hundred Ninety-five Dollars ($195.00).

(5) (NON-DEPENDENT PARENTS.) Where such deceased employee was unmarried and was survived by his or her father and mother, such father and mother shall be paid the sum of One Thousand Eight Hundred Dollars ($1,800.00) each; and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-five Dollars ($195.00) and such other expenses, if any, arising after the injury and before his death not to exceed One Hundred Ninety-five Dollars ($195.00).

(6) (WIDOWER WITH DEPENDENT MINORS: GUARDIAN.) In those cases where such deceased employee was a widower at the time of his death, but left one or more minor orphan children or child wholly dependent upon the deceased for support

by reason of mental or physical incompetency, there shall be paid the sum of Four Thousand Five Hundred Dollars ($4,500.00), and the further sum of Nine Hundred Dollars ($900.00) for each orphan child under the age of eighteen (18) years provided the total amount paid shall not exceed Nine Thousand Dollars ($9,000.00), and the judge of the Probate Court of the precinct wherein such accident or injury occurred, shall appoint a guardian for all of said children, who shall be entitled to, and who shall be paid, the amount specified in this paragraph, for the benefit of said orphan children, and shall divide Four Thousand Five Hundred Dollars ($4,500.00) thereof equally among such children and divide the surplus, if any, among the children under eighteen (18) years of age.

(7) (AMOUNTS PAID NON-RESIDENT NON-CITIZEN BENEFICIARIES.) Provided, however, that if such beneficiary or beneficiaries as described in subdivisions 1 to 6, inclusive, immediately preceding this subsection be neither resident or a citizen of the United States of America, then the amount due and payable to such beneficiary or beneficiaries shall be in amounts as follows:

(a) As to all beneficiaries, except a wife or minor children, fifty per centum (50%) of the sum set forth in subdivisions 1 to 6, immediately preceding, and fifty per centum (50%) shall be paid to the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.

(b) As to a wife or minor children, sixty per centum (60%) of the sums set forth in subdivisions 1 to 6 immediately preceding, and forty per centum (40%) of the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.

(8) (FUNERAL EXPENSES: PAYMENT TO SECOND INJURY FUND). In those cases where such deceased employee was, at the time of his or her death unmarried, and leaves no children nor father nor mother, the employer shall be required to pay the funeral expenses of the deceased not to exceed the sum of One Hundred Ninety-five Dollars ($195.00), and such other expenses, if any, arising after the injury and before the death, not to exceed the further sum of One Hundred Ninety-five Dollars ($195.00), and in addition thereto shall pay to the second injury fund the sum of One Thousand Five Hundred Dollars ($1,500.00), for the sole benefit of those entitled to participate therein as hereinafter provided.

(SECOND INJURY FUND.) There is hereby created a Second Injury Fund, to be administered by the Commissioner of Labor in accordance with the orders and awards of the Alaska Industrial Board.

(TOTAL AND PERMANENT DISABILITY.) Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally or permanently disabled, he or she shall be entitled to receive compensation as follows:

(a) (MARRIED PERSON.) If such employee was at the time of his injury married he shall be entitled to receive Seven Thousand Two Hundred Dollars ($7,200.00) with Nine Hundred Dollars ($900.00) additional for each child under the age of eighteen (18) years, but the total to be paid shall not exceed Nine Thousand Dollars ($9,000.00).

(b) (FATHER AND MOTHER.) If such employee at the time of his injury had no wife or children, but has a mother or father, Six Thousand Three Hundred Dollars ($6,300.00).

(c) (FATHER AND MOTHER.) In cases, where such employee who at the time of his injury had both father and mother, Six Thousand Five Hundred Dollars ($6,500.00).

(d) (MINOR CHILDREN). In those cases, where such employee was at the time of his injury, a widower, or was divorced, but had minor children, he shall receive the sum of Six Thousand Dollars ($6,000.00), with an additional sum of Nine Hundred Dollars ($900.00) for each child below the age of eighteen (18) years, provided that the total sum to be paid such employee shall not in any case exceed the sum of Nine Thousand Dollars ($9,000.00).

(e) (NO DEPENDENTS.) In those cases where such employee so injured at the time of his injury was unmarried and had no children nor father nor mother, he shall receive the sum of Six Thousand Dollars ($6,000.00).

(PARTIAL PERMANENT DISABILITY.) Where any such employee receives an injury arising out of, and in the course of his or her employment, resulting in his or her partial permanent disability, he or she shall be paid in accordance with the following schedule:

For the loss of a Thumb:

1 (a) In case the employee was at the time of the injury unmarried, $720.00.

1 (b) In case the employee was married but had no children, $900.00.

1 (c) In case the employee was either married or a widower, but had one or more children, $1,080.00.

For the loss of an Index Finger:

2 (a) In case the employee was at the time of the injury unmarried, $450.00.

2 (b) In case the employee was married but had no children, $585.00.

2 (c) In case the employee was either married or a widower, but had one or more children, $720.00.

For the loss of any other finger than the Index Finger and Thumb, $270.00.

For the loss of a Great Toe, $450.00.

For the loss of any other Toe other than the Great Toe, $180.00.

For the loss of a Hand:

3 (3) In case the employee was at the time of the injury unmarried, $2,160.00.

3 (b) In case the employee was married but had no children, $2,880.00.

3 (c) In case the employer was either married, or a widower and had one child, $2,880.00 and $360.00 additional for each additional child, not to exceed, however, the total sum of $3,600.00.

For the loss of an Arm:

4 (a) In case the employee was at the time of the injury unmarried, $2,700.00.

4 (b) In case the employee was married but had no children, $3,600.00.

4 (c) In case the employee was either married, or a widower and had one child, $3,600.00 and $450.00 additional for each such additional child, the total amount not to exceed, however, $4,500.00.

For the loss of a Foot:

5 (a) In case the employee was at the time of the injury unmarried, $2,160.00.

5 (b) In case the employee was married but had no children, $2,700.00.

5 (c) In case the employee was either married, or a widower and had one child, $2,880.00 and $360.00 additional for each additional child, but not to exceed the total sum of $3,600.00.

For the loss of a Leg:

6 (a) In case the employee was at the time of the injury unmarried, $2,700.00.

6 (b) In case the employee was married but had no children, $3,600.00.

6 (c) In case the employee was either married, or a widower and had but one child, $3,600.00 with $450.00 for each such additional child, not to exceed the total sum of $4,500.00.

For the loss of an Eye:

7 (a) In case the employee was at the time of the injury unmarried, $2,160.00.

7 (b) In case the employee was married but had no children, $2,880.00.

7 (c) In case the employee was either married, or a widower and had one child, $2,880.00 plus $360.00 for each additional child, not to exceed, however, the total sum of $3,600.00.

For the loss of an Ear: $360.00.

For the loss of hearing in one Ear: $720.00.

For the loss of the Nose: $720.00.

Compensation for permanent total loss of use of a member shall be the same as for the loss of such member.

(DISFIGUREMENT.) The Industrial Board may award proper and equitable compensation for serious head, neck, facial, or other disfigurement, not exceeding, however, the sum of Two Thousand Dollars ($2,000.00).

(TEMPORARY DISABILITY.) For all injuries causing temporary disability, the employer shall pay

the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.

(LOSS OF MEMBERS AS TOTAL PERMANENT DISABILITY.) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or

any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability.

(AMPUTATIONS.) Amputation between the elbow and the wrist shall be considered equivalent to the loss of an arm, and amputation between the knee and ankle shall be considered equivalent to the loss of a leg.

(OTHER PERMANENT PARTIAL INJURIES.) Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars ($7,200.00).

To illustrate: If said employee were of a class that would entitle him or her to Seven Thousand Two Hundred Dollars ($7,200.00) under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her

earning capacity twenty-five per centum (25%), he or she would be entitled to receive One Thousand Eight Hundred Dollars ($1,800.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars ($7,200.00) that twenty-five per centum (25%) does to one hundred per centum (100%). Should such employee receive an injury that would impair his or her earning capacity seventy-five per centum (75%), he or she would be entitled to receive Five Thousand Four Hundred Dollars ($5,400.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars ($7,200.00) that seventy-five per centum (75%) does to one hundred per centum (100%).

(9) (PAYMENTS TO SECOND INJURY FUND.) Whenever an employee shall suffer a compensable injury which results in permanent partial disability by reason of the total or partial loss or loss of use of a member or members, as provided in Paragraph (8) hereof, and which injury entitled him or her to compensate pursuant to such Paragraph (8), the employer, or his insurance carrier, shall, in addition to the compensation provided for in said Paragraph (8), pay into the second injury fund a lump sum, without interest deductions, equal to two per centum (2%) of the total compensation to which the employee is entitled under said Paragraph (8) of this section for the said permanent partial disability, the said sum to be paid into such second injury fund as soon as the total amount of the permanent partial dis-

ability payable for the particular injury is determined by the Industrial Board.

(10) (SECOND INJURY FUND BENEFICIARIES.) The sums required to be paid into the second injury fund under the provisions of Paragraph (7), (8) and (9) of this section shall be paid into said second injury fund of the Commissioner of Labor for the sole benefit of those entitled to participate therein under the provisions of Paragraph (12) of this section, the same to be paid out by said Commissioner of Labor in accordance with the orders and awards of the Industrial Board.

(11) (REFUND OF PAYMENTS TO SECOND INJURY FUND.) In case a deposit or payment has been made into such second injury fund, as provided in Paragraph (7) of this section, and it is later shown that there are other beneficiaries or that the beneficiaries designated are entitled to further or greater benefits, or, as provided in Paragraph (8) of this Section, and it is later shown that there are beneficiaries entitled to compensation, or, if deposits or payment has been made pursuant to Paragraph (9) hereof by mistake or inadvertence or under such circumstances that justice requires a refund thereof, the Industrial Board is hereby authorized to refund such deposit or payment.

(12) (INJURY CAUSING TOTAL PERMANENT DISABILITY WHEN COMBINED WITH PREVIOUS DISABILITY.) In those cases where an employee receives an injury arising out of and in

the course of his or her employment which, of itself, would cause only permanent partial disability but which, combined with a previous disability or injury, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury; provided, however, that in addition to compensation for such permanent partial disability and after the cessation of the payments for the amounts prescribed therefor, the injured employee shall be paid the remainder of the compensation that would be due for permanent total disability out of the second injury found hereinbefore created and provided.

§ 43-3-2. **Treatment and care of injured employees: Duty and liability of employer: Duration: Prevailing fees: Selection of physicians, surgeons and hospitals: Aggravation of injuries by incompetence or neglect of physician: Liability: Right of employee to provide physician.** The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus for such period as the nature of the injury or the process of recovery may require, not exceeding one year from and after the date of injury to any such employee. The employer shall be liable for the payment of the expenses of medical, surgical or other attendance or treatment, nurse, and hospital service, medicine, crutches, and apparatus necessitated by the injury of an employee, for such period as the nature of the injury or the process of recovery may require, not exceeding one

year from and after the date of injury to any such employee. All fees and other charges for such treatment and services shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living. The employer shall have the exclusive right, and it shall be his duty to select and furnish the necessary physicians, surgeons and hospitals and to that end he may enter into all necessary contracts with such physicians, surgeons and hospitals for the furnishing of such services and treatments. Provided, that if it be made to appear in any suit, action or proceeding brought against the employer that the injuries sustained by the employee were aggravated on account of the incompetence or neglect of the physician or surgeon selected by the employer, it shall be prima facie evidence that the employer failed to use due care in the selection of such physician or surgeon and in such case the employer and physician or surgeon shall be jointly and separately liable for all damages resulting from such incompetence or neglect. Nothing contained in this section shall be construed to limit the right of the employee, to provide in any case, at his own expense, a consulting physician or any attending physician whom he may desire.

§ 43-3-3. Time and manner of paying compensation: Interest: Failure to pay compensation: Penalty. All compensation allowed hereunder for temporary disability shall be paid periodically and promptly in like manner as wages, and as it accrues, and directly to the person entitled thereto, without waiting for an

award by the Industrial Board, and shall bear interest from and after the period of thirty days after the date of the injury by which the claim for compensation arose at the rate of eight per centum (8%) per annum until paid. If the employer or insurance carrier shall fail to pay any installment of compensation within twenty days after the same becomes due, there shall be paid by the employer, or his insurance carrier, an additional sum equal to ten per centum (10%) of the compensation then due, unless such delay or default is excused by the Industrial Board, on the application of the employer or insurance carrier and upon the ground that owing to conditions over which the employer or insurance carrier had no control, such payment could not be made.

In all other cases, compensation shall be paid biweekly, monthly, or otherwise, as the Industrial Board may determine to be for the best interest of the injured employee or his or her beneficiaries; and such payments shall bear interest from and after the period of thirty days after the date of the order or award. If the employer or insurance carrier shall fail to pay compensation according to the terms of such order or award within twenty days thereafter, except in the case of an appeal, there shall be paid by the employer, or his insurance carrier, an additional sum equal to twenty per centum (20%) of the compensation due.

§ 43-3-4. Modification of compensation: Continuing jurisdiction: Effect of review upon moneys already paid: Limitation of time. If an injured employee (is)

entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part or subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her. To that end the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order, and on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act. No such review shall affect such award, order or settlement as regards any moneys already paid, except that an award or order increasing the compensation rate may be made effective from a date of injury, and except that if any part of the compensation due or to become due is unpaid an award or order decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury.

§ 43-3-5. Lien to secure compensation: Extent: Priority and rank: Notice of lien: Filing and contents: Enforcement: Attachment. Every employee and every beneficiary entitled to compensation under the provisions of this Act shall have a lien for the full amount of such compensation, including costs and disbursements of suit and attorneys' fees therein allowed or fixed, upon all of the property in connection with the construction, preservation, maintenance or operation of which the work of such injured or deceased employee was being performed at the time of the injury or death of such employee. For example: In the case of an employee injured or killed while engaged in mining or in any work connected with mining, the lien shall extend to the entire mine and all property used in connection therewith; and in the case of an employee injured or killed while engaged in fishing or in the packing, canning or salting of fish, or other branch of the fish industry, the lien shall extend to the entire packing, fishing, salting or canning plant or establishment and all property used in connection therewith; and the same shall be the case with all other businesses, industries, works, occupations and employments. The lien herein provided for shall be prior and paramount and superior to any other lien of the property affected thereby, except liens for wages or materials as is now or may hereafter be provided by law, and shall be of equal rank with all such liens for wages or materials. The lien hereby provided for shall extend to and cover all right, title, interest and claim of the employer of, in and to the property affected by

such lien. Any person claiming a lien under this Act shall, within four months after the date of the injury from which the claim of compensation arises, file for record in the office of the recorder of the precinct in which the property affected by such lien is situated a notice of lien signed and verified by the claimant or some one on his or her behalf, and stating substance, the name of the person injured or killed out of which injury or death the claim of compensation arises, the name of the employer of such injured or deceased person at the time of such injury or death, a description of the property affected or covered by the lien so claimed, and the name of the owner or reputed owner of such property.

The lien for compensation herein provided may be enforced by a suit in equity as in the case of the enforcement of other liens upon real or personal property, at any time within ten months after the cause of action shall arise. Nothing in this Section contained shall be deemed to prevent an attachment of property as security for the payment of any compensation as in this Act provided.

§43-3-6. Compromise: Filing memorandum: Approval by Board: Effect: When agreement to be approved. At any time after death, or after seven days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, shall have the right to reach an agreement in regard to any claim for injury or death hereunder in accordance with the schedule hereof, but

a memorandum of the agreement, in a form prescribed by the Industrial Board shall be filed with the Board, otherwise the same shall be void for any purpose. If approved by the Board, such agreement shall be enforceable the same as any order or award of the Board, and subject only to modification in accordance with the provisions of Section 4 hereof (§ 43-3-4 herein). Such agreement shall be approved by the Board only when the terms conform to the provisions of this Act, and, if it involves or is likely to involve permanent disability, only after an impartial examination and an opportunity to be heard.

§43-3-7. Injuries not covered. No compensation shall be allowed or paid for the injury or death of an employee in any case where such injury or death was occasioned by his or her wilful intention to bring about the injury or death of himself or herself or of another, or where the employee's intoxication was the proximate cause of injury.

§ 43-3-8. When right to compensation accrues: Period of incapacity: Report to employer: Compensation not to be paid prior to report. No compensation shall be paid hereunder for any injury which does not incapacitate the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred, but if incapacity extends beyond such period compensation shall commence on the second day after the injury. It shall be the duty of every person claiming compensation under the provisions of this Act for any injury sustained by him to make or cause to be made, a report thereof to his em-

ployer as soon as practicable after sustaining the same, and no compensation shall be paid prior to the day on which such report is made.

§43-3-9. Presumption of employment: "Independent contractors" defined. Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this Act. The term "independent contractor" shall be taken to mean, for the purpose of this Act, any person who renders service, other than manual labor, for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

§43-3-10. Right to compensation exclusive: Failure to secure insurance: Election of remedies: Pleading or proof of contributory negligence unnecessary: Defenses barred. The right to compensation for an injury and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided for by this Act, shall accrue to employees entitled to compensation under this Act while it is in effect; nor shall any right or remedy, except those provided for by this Act accrue to the person or legal representative, dependents, beneficiaries under this Act, or next of kin of such employee; provided, however, that if an employer fails to secure the payment of compensation as required by this Act, by insuring with an authorized insurance carrier or by meeting the requirements for

self-insurance, then any injured employee, or, in case of death, his or her beneficiaries, may, at his, her or their option, elect to claim compensation under this Act or to maintain an action in the courts for damages on account of such injury or death; and, in the event of his, her or their election to bring such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead or prove as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due, in whole or in part, to the contributory negligence of the employee.

§ 43-3-11. Step-parents, adopted children, and step-children: How regarded. Step-parents shall be regarded in this Act as parents, and an adopted child, or adopted children, or a step-child or children, shall be regarded in this Act as issue of the body.

§ 43-2-12. Statement of beneficiaries by employee: Change in beneficiaries or address: Notice to beneficiaries: Form: Failure to list or notify beneficiaries: Employee's statement as evidence: Service of notice of claim.

(a) (STATEMENT OF BENEFICIARIES BY EMPLOYEE.) Every employer coming within the provisions of this Act shall require of every employee who shall execute the same, either at the time he or she is employed or thereafter, a written statement showing the name or names of each and all persons that would be entitled to benefits under the provisions of this Act in case such employee should become deceased

as a result of any injury received by him, or her, arising out of and in the course of his or her employment, such written statement shall bear the date upon which the same shall be furnished to the employer, and shall be signed by the employee. Provided, that, in cases where such employee is unable to write his or her name, his or her name may be affixed to such statement by another, and such employee shall make his or her mark in the manner customary in such cases and such mark shall be made in the presence of at least one witness, who shall subscribe such statement as a witness. In all cases the employee shall be furnished a duplicate of the said statement.

(b) (CHANGE IN BENEFICIARIES OR ADDRESS THEREOF.) In all cases where there shall be a change of beneficiaries, or a change in the address of any beneficiary, the employee may furnish the employer with a new statement showing such change, such new statement to be so furnished shall in all respects conform and comply with the provisions hereof with reference to the original statement to be furnished.

(c) (NOTICE TO BENEFICIARIES.) In all cases where such statement, or statements, is, or are, furnished the employer by the employee, the employer shall, if such employee becomes deceased as a result of an injury received in the course of his or her employment, notify each beneficiary named in the last statement of the fact; such notice shall be given by sending each beneficiary at the address given in the last statement furnished a copy of such notice by

registered mail, and an envelope containing such notice addressed to each beneficiary at the address given in said last statement furnished, shall be deposited in the post office and registered, within ten days after such employee shall have become deceased.

(d) (NOTIFICATION FORM.) The notice to be given shall be substantially in the following form:

To ..... (giving the name of the beneficiary).

This is to advise you that..... (giving the name of the deceased person) became deceased on the ..... day of..... as a result of an injury received while in the employ of..... You will take notice that all persons entitled to benefits because of the fact that the above named employee was injured and as a result thereof became deceased, under the laws of Alaska, are required to serve notice upon the employee with one hundred and twenty (120) days after the date on which such employee became deceased, in accordance with the provisions of the laws of Alaska upon that subject, and that failure to serve such notice within the time specified and in the manner specified will result in depriving the beneficiary, failing to give such notice within such time and in such manner, of his or her rights to compensation under the laws of Alaska.

(e) (FAILURE OF EMPLOYEE TO LIST BENEFICIARIES.) Any failure on the part of the employee to supply the employer with a statement as hereinabove provided shall not work a forfeiture of

the right of his or her beneficiaries to benefits hereunder.

(f) (FAILURE OF EMPLOYER TO NOTIFY BENEFICIARIES.) In cases where the employer shall have been furnished with such statements and shall fail to notify the beneficiaries therein named as shown by the last statement furnished, within the time and manner herein provided, such beneficiaries who have not been so notified shall have the right to notify the employer of their claims to benefits and file claims and prosecute actions or other proceedings for the recovery thereof, notwithstanding the fact that such notice was not served as hereinafter provided within the period of one hundred and twenty (120) days from and after the time the employee became deceased.

(g) (EMPLOYEE'S STATEMENT AS EVIDENCE.) Upon the trial of any issue relating to a beneficiary's right to compensation under this Act, any written statement furnished an employer, as hereinabove provided, may be offered in evidence and shall be prima facie but not conclusive evidence that there are no other beneficiaries.

(h) (NOTICE OF BENEFICIARY'S CLAIM: SERVICE.) In all cases where any person claims to be a beneficiary under this Act entitled to compensation because of an injury to an employee coming within its provisions, which resulted in such employee's death, someone in his or her behalf shall within one hundred and twenty (120) days from and after the death of such employee serve a written notice upon

the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and if such beneficiary shall be either the father or mother of the deceased, such notice shall also contain a statement showing that such persons were dependent upon the earnings of the deceased. Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this Act. Such notice may be served by any person of legal age by delivering a copy thereof to the employer or the employer's agent in person or by leaving a copy thereof at the employer's principal place of business within the Territory of Alaska with some person over the age of eighteen (18) years in the employ of such employer, or by mailing the same by registered mail, addressed to said employer at his last known business address. If the employer cannot be found within the Territory and has no known agent or place of business therein, such beneficiary may serve such notice by registered mail upon the Industrial Board, and it shall be the duty of such Industrial Board to publish the same in one issue of any newspaper of general circulation published in the Judicial Division where the injury, out of which the right to compensation arose, occurred. Failure to give such notice shall not bar any claim (1) if the employer or his agent in charge of the business at the place where the injury occurred, or the insurer, had knowledge of

the injury or death and the Industrial Board determines that the employer or insurer has not been prejudiced by the failure to give such notice; or (2) if the Industrial Board finds that there was good cause for not giving such notice; Provided that no objection based on such failure shall be considered unless made at the first hearing of the claim before the Board. In case of doubt as to the proper beneficiaries, the employer shall submit the matter to the determination of the Industrial Board.

§43-3-13. Notice in non-fatal cases: No compensation until notice or knowledge: Defective notice: Prejudice: Contents of notice: Signature and service. In all cases of injury not resulting in death, unless the employer or his agent shall have actual knowledge of the occurrence of the injury at the time thereof, or shall acquire such knowledge afterward, the injured employee, or someone in his or her behalf, as soon as practicable after the injury, shall give written notice to the employer of such injury, such notice may be given in the manner provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

Unless such notice is given or knowledge acquired within sixty days from the date of the injury, no compensation shall be paid until and from the date such notice is given or knowledge obtained, but no lack of knowledge by the employer or his agent and no want, failure, defect or inaccuracy of the notice shall bar compensation, unless the employer was prejudiced thereby, and then only to the extent of such prejudice.

The notice provided for in this Section shall state the name and address of the employee, the time, place, nature and cause of the injury, and shall be signed by the employee, as provided in paragraph (a) of Section 12 (§ 43-3-12 herein), or by some one in his or her behalf, and served as provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

§ 43-3-14. Rules: Process and procedure to be summary and simple: Powers of board: Subpoenas: Service and fee: Fees and mileage of witnesses. The Industrial Board may make rules not inconsistent with this Act for carrying out the provisions hereof. Process and procedure under this Act shall be as summary and simple as reasonably may be. The Board or any member thereof shall have the power for the purpose of this Act to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to have examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute.

Subpoenas of the Board shall be served by the marshal, or any deputy marshal, or by a person specially appointed by the marshal. The fees shall be the same as fees now provided by law for like service in civil actions. Each witness who appears in obedience to such subpoena of the Industrial Board shall receive for attendance the fees and mileage for witnesses in civil cases in the courts.

The District Court, on application of the Industrial Board or any member thereof, shall enforce, by proper

proceedings, the attendance and testimony of witnesses and the production and examination of books, papers and records.

§ 43-3-15. Procedure in disputed claims: Application for hearing: Fixing time and place of hearing: Where hearing to be held: Determination: Filing award: Copies to parties. If the employer and the injured employee, or his or her beneficiaries, disagree in regard to the compensation payable under this Act, or if they have reached such an agreement, which has been signed by him, her or them and has been filed with and approved by the Industrial Board as provided in Section 6 (§ 43-3-6 herein), and afterwards disagree as to the continuance of payments under such approved agreement, or as to the period for which payments shall be made, or as to the amount to be paid, or if a dispute arises for any other reason, either party may then make application to the Industrial Board for the determination of the matters in dispute.

Upon the filing of such application, the Board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the Board, of the time and place of such hearing. Such hearings shall be held in the district in which such injury occurred, unless, for the convenience of witnesses or other good cause, the Board determines that such hearing should be held elsewhere.

All disputes arising under this Act, if not settled by agreement as in this Act provided, shall be determined

by the Board; and nothing in this Section contained shall be construed to affect the continuing jurisdiction of the Board as provided in Section 4 (§ 43-3-4 herein) nor to prevent such Board from making any investigation on its own motion.

The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of the proceedings, and a copy thereof shall immediately be sent to each of the parties.

§ 43-3-16. Review by full Board: Application: Time for: Award: Filing: Copies. If an application for review is made to the Industrial Board within ten days from the date of an award, made by less than all the members, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith.

§ 43-3-17. Judgment on agreement or award: Effect: Modification: Costs. Any party in interest may file in the District Court for the division in which the employer resides or has his place of business, a certified copy of the memorandum of agreement approved by the Board, or of an order or decision of the Board, or of an award of the full Board unappealed from, or of an award of the full Board affirmed upon an appeal, whereupon said court shall render judgment in

accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though said judgment had been rendered in a suit duly heard and determined by said court.

Any such judgment of said District Court unappealed from or affirmed on appeal or modified in obedience to the mandate of the Appellate Court, shall be modified to conform to any decision of the Industrial Board, ending, diminishing or increasing any payment under the provisions of Section 4 of this Act (§ 43-3-4 herein), upon the presentation to it of a certified copy of such decision.

In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court.

§43-3-18. Insurance or proof of financial ability: Deposit of security. Every employer under this Act, except those exempted by Section 1 (§ 43-3-1 herein), shall either insure and keep insured his liability hereunder in some insurance company or association duly authorized to transact business of Workmen's Compensation Insurance in the Territory, or shall furnish to the Industrial Board satisfactory proof of his financial ability to pay direct the compensation provided for in this Act. In the latter case the Board may, in its discretion, require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred.

§ 43-3-19. Filing evidence of compliance: Exception: Failure to comply. Every employer under this Act, except those exempted therefrom by Section 1 (§ 43-3-1 herein), shall, within ten days after this Act takes effect, file with the Industrial Board, in the form prescribed by it, and thereafter within ten days after the termination of his insurance by expiration or cancellation, evidence of his compliance with the insurance provisions of Section 18 (§ 43-3-18 herein) and all others relating to insurance under this Act; provided, that this requirement shall not apply to employers who have procured from the Industrial Board certificates of their financial ability to pay compensation directly without insurance.

Any employer hereafter coming under the compensation provisions of this Act shall, in like manner, file like evidence of such compliance.

If such employer fails, refuses, or neglects to comply with the provisions of this Section, he shall be subject to the penalties provided in Section 24 (§ 43-3-24 herein) for failure to report accidents; but nothing herein contained shall be construed as affecting the rights conferred upon injured employees or their beneficiaries under Section 10.

§ 43-3-20. Self-insurance certificates: Revocation: New certificate. Whenever an employer has complied with the provisions of Section 18 (§ 43-3-18 herein) relating to self-insurance, the Industrial Board shall issue to such employer a certificate which shall remain in force for a period fixed by the Board, but the Board may, upon at least ten days' notice and a hear-

ing, revoke the certificate of such employer upon satisfactory proof that such employer is no longer entitled thereto.

At any time after such revocation the Board may grant a new certificate to the employer, upon his petition and satisfactory proof of his financial ability as provided in Section 18 (§ 43-3-18 herein).

§43-3-21. Insurance policies: Approval by Insurance Commissioner: Presumption of coverage: Limitation of liability: Policy provisions.

(APPROVAL BY INSURANCE COMMISSIONER.) No insurer shall enter into or issue any policy of insurance under this Act until its policy form shall have been submitted to and approved by the Insurance Commissioner. The Insurance Commissioner shall not approve the policy form of any insurance company until such company shall file with it the certificate of the Commissioner of Insurance showing that such company is authorized to transact the business of Workmen's Compensation Insurance in the Territory. The filing of a policy form by any insurance company with the Industrial Board for approval shall constitute, on the part of such company, a conclusive and unqualified acceptance of each and all of the provisions of this Act, and an agreement by it to be bound thereby.

(PRESUMPTION OF COVERAGE.) All policies of insurance companies insuring the payment of compensation under this Act shall be conclusively presumed to cover all the employees and the entire com-

pensation liability of the insured employer employed at or in connection with the business of the employer carried on, maintained, or operated at the location or locations set forth in such policy or agreement.

(LIMITATION OF LIABILITY VOID.) Any provision in any such policy attempting to limit or modify the liability of the company issuing the same shall be wholly void except as provided in the preceding paragraph.

(REQUIRED POLICY PROVISION.) Every policy of any such company must contain the following provisions:

(a) (EXTENT OF COVERAGE.) The insurer hereby assumes in full all the obligations to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicine, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits imposed upon the insured under the provisions of the Alaska Workmen's Compensation Law.

(b) (SUBJECTION TO ACT.) That the policy is made subject to the provisions of the Alaska Workmen's Compensation Law, and the provisions of said Act relative to the liability of the insured employer to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits to and for said em-

ployees or beneficiaries, the acceptance of such liability by the insured employer, the adjustment, trial and adjudication of claims for such physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits and the liability of the insurer to pay the same are and shall be a part of this policy contract as fully and completely as if written herein.

(c) (NOTICE TO EMPLOYER.) That, as between the insurer and the employee or his or her beneficiaries, notice to or knowledge of the occurrence of the injury on the part of the insured employer shall be notice or knowledge thereof, as the case may be, on the part of the insurer; that the jurisdiction of the insured employer for the purpose of the Alaska Workmen's Compensation Act shall be the jurisdiction of the insurer, and the insurer shall, in all things, be bound by and shall be subject to the orders, awards, judgments and decrees rendered against the insured employer under said Act.

(d) (CONDITIONS OF PAYMENT.) That the insurer will promptly pay to the person or persons entitled to the same, all benefits conferred by the Alaska Workmen's Compensation Act, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, and all installments of compensation or death benefits that

may be awarded or agreed upon under said Act; that the obligation of the insurer shall not be affected by any default of the insured employer after the injury, or by any default in giving of any notice required by this policy; that the policy is and shall be construed to be a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation or death benefits, and shall be enforceable in the name of such person or persons.

(e) (NOTICE OF TERMINATION.) That any termination of the policy by cancellation shall not be effective as to the employees of the insured employer covered thereby until ten days after written notice of such termination has been received by the Industrial Board. Provided, however, that if the employer has secured insurance with another insurance carrier, cancellation shall be effective as of the date of such other coverage.

(f) (JOINT LIABILITY.) That all claims for compensation, death benefits, physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, may be made directly against either the employer or the insurer, or both, and the order or award of the Industrial Board may be made against either the employer or the insurer or both.

(g) (REVOCATION BY COMMISSIONER.) That if any insurer shall fail or refuse to pay any final award or judgment (except during the pendency of an appeal) rendered against it, or its insured, or, if it shall fail or refuse to comply with any provisions of this Act, the Insurance Commissioner shall revoke the approval of the policy form, and shall not accept any further proofs of insurance from it until it shall have paid said award or judgment or complied with the violated provision of this Act, and shall have resubmitted its policy form and received the approval thereof by the Insurance Commissioner.

§ 43-3-22. Award to be final and conclusive: Questions of fact: Injunction proceedings: Certification of questions by Board: Advancement on docket: Early determination: Increase in award. An award of the Board, by less than all of the members, as provided in Section 15 (§ 43-3-15 herein), if not reviewed as provided in Section 16 (§ 43-3-16, herein), shall be final and conclusive.

An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if such award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the district in which the injury occurred. The orders, writs and processes of the court in such proceeding may run, be served, and

be returned in accordance with the rules of said court, but the return day and hearing thereon shall not be later than sixty days after the institution of such proceedings. The payment of the amounts required by such award shall not be stayed pending final decision in any such proceeding unless, upon application for an interlocutory injunction, the court on hearing, after not less than ten days' notice to the parties and the Industrial Board, allows the stay of such payments, in whole or in part, where substantial damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such substantial damage would result to the employer, and specifying the nature of the damage.

The Board, of its own motion, may certify questions of law to said court for its decision and determination.

All such appeals and certified questions of law shall be advanced upon the docket of said court, and shall be determined at the earliest practicable date, without extensions of time for filing briefs.

Any award of the full Board affirmed on court review at the instance of the employer or his insurance carrier may be increased ten per centum by order of the court.

§ 43-3-23. Fees of attorneys and physicians: Approval: Statement of attorney's fees: Effect and payment: Report by physician. The fees of attorneys and physicians, and the charges of nurses and hospitals,

for services under this Act shall be subject to the approval of the Industrial Board. When any claimant for compensation is represented by an attorney in the prosecution of his or her claim, the Industrial Board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fee. The fee so fixed shall be binding upon both the claimant and his or her attorney, and the employer shall pay to the attorney out of the award, the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award. The Industrial Board may withhold the approval of the fees of the attending physician in any case until he shall file a report with the Industrial Board on the form prescribed by such Board.

§ 43-3-24. Records and reports of injuries: Contents of report: Violations as misdemeanor: Punishment. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within one week after occurrence and knowledge thereof, as provided in Sections 12 and 13 (§§ 43-3-12, 43-3-13 herein) of an injury to an employee causing his or her death or absence from work for more than one day, a report thereof shall be made in writing and mailed to the Industrial Board on blanks to be procured from the Board for the purpose.

The said report shall contain the name, nature and location of the business of the employer, the name, age, sex, wages, occupation of the injured employee, the date and hour of the injury and the nature and

cause thereof, and such other information as may be required by the Industrial Board.

Whoever shall fail or refuse to comply with the foregoing provisions, or whoever shall violate any of the provisions of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than Fifty Dollars nor more than Five Hundred Dollars.

§ 43-3-25. Jurisdiction of courts. No court of this Territory except the United States District Court on review, or the United States Circuit Court of Appeals on appeal, shall have jurisdiction to review, vacate, set aside, reverse, correct, amend or annul any order or award of the Industrial Board or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Industrial Board in the performance of its duties.

§ 43-3-26. Attachment: Procedure: Affidavit: Contents: Insurance of writ without bond: Form, service, execution and return: Undertaking by defendant: Effect.

(a) (AFFIDAVIT: CONTENTS.) A writ of attachment shall be issued by the Clerk of the Court in which any action for the recovery of damages under the provisions of Section 10 (§ 43-3-10 herein) is pending, or by the United States Commissioner in any such action pending in the court of such Commissioner. Whenever the plaintiff or anyone in his behalf shall make and file an affidavit showing that he or she is entitled to recover compensation from the

defendant, under the provisions hereof, but that such defendant has failed to comply with the provisions of Sections 18 and 19 of this Act (§§ 43-3-18, 43-3-19 herein), and the certificate of the Industrial Board to that effect shall be prima facie evidence of the fact, such affidavit must show all the facts necessary to bring the plaintiff within the provisions hereof, and must further set up all the facts necessary to show that a cause of action exists in favor of the plaintiff and against the defendant for the amount sued for and for which the attachment is sought under the provisions hereof.

(b) (ISSUANCE OF WRIT WITHOUT BOND: FORM, SERVICE, EXECUTION AND RETURN.) Upon filing such affidavit in actions pending as aforesaid with the Clerk of the Court, or, the Commissioner, in actions pending in the court of such Commissioner, the plaintiff shall be entitled to have a writ of attachment issued without filing any bond or other security such writ shall be directed to the marshal and shall in all respects conform to writs of attachment in other cases and shall be issued, served, executed and returned in the same manner that writs of attachment in other cases are now issued, executed and returned.

(c) (UNDERTAKING BY DEFENDANT: EFFECT.) The defendant may, however, file a written undertaking in any pending cause for the benefit of the plaintiff in an amount equal to double the amount sued for, executed by two or more sufficient sureties, to be approved by the Judge or Commissioner in

whose court the action is pending and conditioned that the defendant will pay any judgment that may be awarded against such defendant in the action. No writ of attachment shall issue after such undertaking has been filed by the defendant, and if such undertaking shall be filed after the writ has been issued, such writ shall be quashed and if property has been attached under such writ at the time of the filing of such undertaking, such attachment shall be dissolved and set aside and the property attached and (sic) returned to the defendant.

§ 43-3-27. Physical examination: Submission to: Presence of employee's physician: Privilege: Refusal to submit to examination: Effect: Autopsy: Notice to widow or next of kin. The employee shall after an injury at reasonable times during the continuance of his or her disability, if so requested by his or her employer, or when ordered by the Industrial Board, submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory or State in which such employee may be found, furnished and paid for by the employer, or by the Board. The employee shall have the right to have a physician, provided and paid for by himself or herself, present at such examination or examinations. No fact communicated to, or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in the hearings provided for in this Act, or any action to recover damages against any em-

ployer who is subject to the compensation provisions of this Act. If any employee refused to submit himself or herself to any such examination to examinations provided for herein, his or her rights to compensation shall be suspended until such obstruction or refusal ceases, and his or her compensation, during such period of suspension, may, in the discretion of the Industrial Board, or the court determining an action brought for the recovery of damages hereunder, be forfeited.

The employer, or the Industrial Board, shall have the right in any case of death to require an autopsy at the expense of the party requesting same.

No autopsy shall be held in any case without notice first being given to the widow or next of kin, if they reside in the Territory, or their whereabouts can reasonably be ascertained, of the time and place thereof and reasonable time and opportunity given such widow or next of kin to have a representative present to witness the autopsy shall be suppressed on motion duly made to the Industrial Board, or to the Court, as the case may be.

§ 43-3-28. Waiver or exemption from statute forbidden. No agreement by an employee to waive his or her rights to compensation under this Act shall be valid, except as herein elsewhere provided, and no employer or employee shall exempt himself, herself or itself, except in the manner herein elsewhere provided, from the burden or waive the benefits of this Act, by any contract, agreement, rule, regulation or

device, and any such contract, agreement, rule, regulation or device shall be absolutely void.

§ 43-3-29. Claims barred if not filed within two years. Any and all claims for compensation hereunder shall be barred unless a claim for compensation shall be filed with the Industrial Board within two years after the injury, or, if death results therefrom, within two years after such death, after the injury was sustained, or, in the event of mental incapacity, within two years after the removal of such mental incapacity.

§ 43-3-30. Liability of third persons: Proceedings by employer: Subrogation to employee. Where the injury for which compensation is payable hereunder was caused under circumstances creating a legal liability in someone other than the employer to pay damages in respect thereof, the employee may take proceedings against the one so liable to pay damages and against any one liable to pay compensation under this Act, but shall not be entitled to receive both damages and compensation. And if the employee has been paid compensation under this Act, the employer by whom the compensation was paid shall be entitled to indemnity from the person, firm or corporation so liable to pay damages as aforesaid and to the extent of such indemnity shall be subrogated to the rights of the employee to recover damages therefor.

§ 43-3-31. Report of termination of compensation. Every employer paying compensation directly without insurance, and every insurance carrier paying compensation in behalf of an employer, shall, within ten

days from the termination of the compensation period fixed in any award against him or its insured, for an injury or death, either by the approval of an agreement or upon hearing, and within ten days from the full redemption of any such approved agreement or award, by the cash payment thereof in a lump sum or otherwise, as in this Act or by the order or award of the Industrial Board provided, shall make such report or reports as the Industrial Board may require.

§ 43-3-32. Failure to secure payment: Common law defenses abolished: Presumptions. If such employer fails to provide security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), such employer shall not escape liability for personal injury sustained by an employee of such employer when the injury sustained arises out of and in the usual course of the employment because:

(1) The employee assumed the risks inherent to or incidental to or arising out of his or her employment or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of an employer to furnish reasonably safe tools or appliances, or because the employer exercises reasonable care in selecting reasonably competent employees in the business;

(2) That the injury was caused by the negligence of a coemployee.

(3) That the employee was negligent, unless and except it shall appear that such negligence was wilful

and with intent to cause the injury, or was the result of wilful intoxication on the part of the injured party;

(4) In such actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment where the employer has failed to provide the security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), it shall be presumed that the injury to the employee was the first result growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of proof shall rest upon the employer to rebut the presumption of negligence.

§ 43-3-33. Presumption of direct payment: Notice: Posting: Places of posting: Form of notice. Every such employer shall be conclusively presumed to have elected to pay compensation directly to employees for injuries sustained arising out of and in the course of the employ- according to the provisions hereof, unless and until notice in writing of insurance, stating the name and address of the insurance company and the period of insurance, shall have been given to the employee. Such notice shall be posted and kept on the premises of the employer or on the premises where the employer's operations are being carried on in three conspicuous places; one of which shall be at the office of the employer; one at the mess house or boarding house, if there be one, and the third in some conspicuous place on the premises or works. Such recorded and posted notice shall be substantially in the

following form, and the signature shall be witnessed by two witnesses:

EMPLOYER'S NOTICE OF INSURANCE

To the employees of the undersigned:

You and each of you are hereby notified that the undersigned is insured in the.....Insurance Company, whose address is.....and that the period covered by such insurance is..... .....in accordance with the terms, conditions and provisions to pay compensation to employees of the undersigned for injuries received as provided in the Act of the Territory of Alaska, known as the "Workmen's Compensation Act of the Territory of Alaska."

(Signed).....

Witnesses: .....

.....

§ 43-3-34. Article to be part of every contract of hire: Construction. This article shall constitute part of every contract of hire, express or implied, and the same shall be construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner hereby provided for all personal injuries sustained, arising out of and in the course of employment.

§ 43-3-35. When excluded employee presumed to accept compensation under this Act: Voluntary Insurance. All employees excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein) shall be conclusively presumed to have elected to take compensa-

tion in accordance with the provisions of Section 33 (§ 43-3-33 herein) in the following cases.

(a) In the event that any employer who employs a person or persons in domestic service, or who is engaged in agriculture, dairying, or the operation of railroads as common carriers, and is, therefore, by reason of the provisions of Section 1 (§ 43-3-1 herein) excluded from the terms, conditions and provisions hereof, voluntarily obtains insurance for the protection of his or its employees for injuries arising out of and in the course of the employment, the rights and remedies hereof shall apply where an employee brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his or her employment, and such employee shall be and remain subject to the provisions hereof the same as if such employment had not been excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein).

§ 43-3-36. Alaska Industrial Board created: Members: Chairman: Powers. A Board is hereby created which shall be known as the "Alaska Industrial Board," to be composed of the following three members: The Territorial Insurance Commissioner, the Attorney General and the Territorial Commissioner of Labor. The Commissioner of Labor shall be Chairman of the Alaska Industrial Board, and shall be the executive officer of the Board, and shall be empowered to perform all acts necessary to carry into effect all provisions of this Act.

§ 43-3-37. Assignment of claim: Waiver of exemption. No claim for compensation, or compensation agreed upon, awarded, adjudged, or paid, shall be assignable, or subject to levy, execution, attachment, garnishment, or any other remedy or procedure for the recovery or collection of a debt, and this exemption cannot be waived.

§ 43-3-38. Definition of terms. Wherever the term "employer" is used in this Act, reference is had to the Territory or any of its political subdivisions and to any person or persons, partnership, joint stock company, association or corporation employing three or more persons in connection with any business or industry coming within the scope hereof and carried on in this Territory, and whenever the term "employee" is used herein, reference is had to an employee employed by an employer as above defined.

If the employer is insured, the term "employer" shall include the insurer so far as applicable.

The term "beneficiary" as used herein refers to any person entitled to compensation under the provisions hereof.

The masculine gender, whenever used herein, shall be held to include the feminine and neuter.

For the purpose of this Act, "child" or "children" shall mean a child or children under the age of eighteen years depending upon the injured employee for support.

"Widower" shall include one who is divorced and is not required by decree of divorce to contribute to the support of his former wife.

"Married" shall include one who is divorced but is required by the decree of divorce to contribute to the support of his former wife.

The term "injury" or "personal injury" means an injury by accident arising out of and in the course of employment, including any disease proximately caused by the employment, which is due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation, process or employment, and to exclude all ordinary diseases of life to which the general public are exposed; including, also, any injury caused by the wilful act of a third person directed against the employees because of his or her employment, but shall not include injuries caused by the employee's wilful intention to injure himself or herself or to injure another or caused by his or her wilful intoxication.

§ 43-3-39. Title of Act. This Act shall be cited as "The Workmen's Compensation Act of Alaska."

§ 43-3-40. Separability of Provisions. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

§ 43-3-41. Laws Repealed. This Act shall supersede and repeal all other laws of the Territory relat-

ing to Workmen's Compensation, and Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska 1933,[a] as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 44, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937, are specifically repealed.''

[a]Formerly Chapter 25, Session Laws of Alaska 1929.

Appendix B

UNITED STATES OF AMERICA,
TERRITORY OF ALASKA.—SS.

R. E. ROBERTSON, being first duly sworn on oath deposes and says I am attorney for the appellant; that in the absence of the record so showing I state:

(a) Lathourakis' deposition was taken before one or more members of the Board on May 26, 1949.

(b) The hearing was held before the full Board on August 30, 1949.

(c) The Board made its decision and award on September 28, 1949, but the Board did not notify the appellant thereof until October 1, 1949.

(d) Appellant's complaint and appeal was filed with the Clerk of the District Court for the Third Judicial Division on October 27, 1949.

R. E. ROBERTSON.

Subscribed and sworn to before me this 15th day of August, 1950, in Juneau, Alaska.

(Seal) F. O. EASTAUGH,
Notary Public for the Territory of Alaska.
My commission expires June 10, 1954.